CUSTOMS BULLETIN AND DECISIONS

Weekly Compilation of

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Concerning Customs and Related Matters of the

U.S. Customs Service

U.S. Court of Appeals for the Federal Circuit

and

U.S. Court of International Trade

VOL. 28 **MARCH 23, 1994** **NO. 12**

This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

Treasury Decisions

19 CFR Part 4

(T.D. 94–20)

ADDITION OF TUVALU TO THE LIST OF NATIONS ENTITLED TO SPECIAL TONNAGE TAX EXEMPTION

AGENCY: United States Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: Pursuant to information provided by the Department of State, the Customs Service has found that Tuvalu does not impose discriminating duties of tonnage or imposts upon vessels belonging to citizens of the United States, or upon the produce, manufactures, or merchandise imported in the same from the United States or from any foreign country. Accordingly, vessels of Tuvalu are exempt from special tonnage taxes and light money in ports of the United States. This document amends the Customs Regulations by adding Tuvalu to the list of nations whose vessels are exempt from the payment of any higher tonnage duties than are applicable to vessels of the United States and from the payment of light money.

DATES:

Effective date: This amendment to the Customs Regualtions is effective March 15, 1994.

Applicability date: The reciprocal privileges for vessels registered in Tuvalu were applicable as of January 1, 1993.

FOR FURTHER INFORMATION CONTACT: Barbara Whiting, Carriers Rulings Branch, 202–482–6940.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Generally, the United States imposes regular and special tonnage taxes, and a duty of a specified amount per ton, called "light money," on all foreign vessels which enter United States ports (46 U.S.C. App. 121, 128). However, vessels of a foreign nation may be exempted from the payment of special tonnage taxes and light money upon presentation of

satisfactory proof that no discriminatory duties of tonnage or impost are imposed by that foreign nation on U.S. vessels or their cargoes (46 U.S.C. App. 141).

Section 4.22, Customs Regulations (19 CFR 4.22), lists those nations whose vessels have been found to be exempt from the payment of any higher tonnage duties than are applicable to vessels of the United States and from the payment of light money. The authority to amend this section of the Customs Regulations has been delegated to the Chief, Regulations Branch.

FINDING

On the basis of information received from the Department of State regarding the absence of discriminatory duties of tonnage or impost imposed on U.S. vessels in the ports of Tuvalu, the Customs Service has determined that the vessels of Tuvalu are exempt from the payment of the special tonnage tax and light money, effective January 1, 1993, and that the Customs Regulations should be amended accordingly.

REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Because this amendment merely implements a statutory requirement and confers a benefit upon the public, pursuant to 5 U.S.C. 553(b)(B), notice and public procedure requirements thereof are unnecessary; further, for the same reasons, good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(1) and (3). Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). This amendment does not meet the criteria for a significant regulatory action under Executive Order (E.O.) 12866.

DRAFTING INFORMATION

The principal author of this document was Janet Johnson, Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

LIST OF SUBJECTS IN 19 CFR PART 4

Customs duties and inspections, Cargo vessels, Maritime carriers, Vessels.

AMENDMENT TO THE REGUALTIONS

Accordingly, Part 4, Customs Regulations (19 CFR Part 4), is amended as set forth below:

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority for Part 4 continues to read, in part, as follows:

Authority: 5 U.S.C. 301, 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C. App. 3, 91;

* * * * * * *

Section 4.22 is also issued under 46 U.S.C. App. 121, 128, 141.

* * * * * * *

2. Section 4.22 is amended by inserting "Tuvalu" in appropriate alphabetical order.

Dated: March 7, 1994.

HAROLD M. SINGER,
Chief,
Regulations Branch.

[Published in the Federal Register, March 15, 1994 (59 FR 11898)]

(T.D. 94–21)

SYNOPSES OF DRAWBACK DECISIONS

The following are synopses of drawback contracts approved November 26, 1993, to February 3, 1994, inclusive, pursuant to Subpart C, Part 191, Customs Regulations; and an approval under Treasury Decision 84–49.

In the synopses below are listed for each drawback contract approved under 19 U.S.C. 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the proposal was signed, the basis for determining payment, the Regional Commissioner to whom the contract was forwarded or approved by, and the date on which it was approved.

Dated: March 7, 1994.

MARVIN M. AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

(A) Company: Aectra Refining & Marketing, Inc.
Articles: Intermediate and finished petroleum products
Merchandise: Pentanes
Factories: Deer Park, Galena Park, Pasadena, Houston, Port Neches, TX; Carterest, NJ, as agents operating under T.D. 55207(1) and T.D. 55027(2)
Proposal signed: April 22, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Houston, January 13, 1994

(B) Company: Amoco Performance Products, Inc.
Articles: Various specialty engineering polymers
Merchandise: Sulfone monomer; Bisphenol-S; Biphenol; PEEK; potassium carbonate
Factories: Augusta, GA; Marietta, OH
Proposal signed: April 6, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, January 19, 1994

(C) Company: BASF Corp.
Articles: Acrylonitrile/styrene/acrylate copolymer in plastic and pellet form (various grades and colors)
Merchandise: Acrylonitrile/styrene/acrylate resins (Luran S VLB and Luran S VLZ); Styrene/acrylonitrile resins (Luran VLP and Luran KR2556 Natural KG2)
Factories: Rosenberg, TX, an agent operating under T.D. 55207(1) and/or 55027(2)
Proposal signed: October 14, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, February 1, 1994

(D) Company: CPS Chemical Co., Inc.
Articles: Dimethylaminoethyl methacrylate (a/k/a Ageflex FM–1, Ageflex FM–1 Q80 DMS, and Ageflex Q75)
Merchandise: Dimethyl aminoethanol (DME)
Factories: Old Bridge, NJ; West Memphis, AR
Proposal signed: February 22, 1993
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Contract forwarded to RC of Customs: Houston, December 16, 1993

(E) Company: Cargill Citro-America, Inc.
Articles: Orange juice from concentrate; frozen concentrated orange juice; bulk concentrated orange juice
Merchandise: Concentrated orange juice for manufacturing
Factories: Elizabeth, NJ; Frostproof, FL
Proposal signed: October 22, 1993
Basis of claim: Used in
Contract issued by RC of Customs in accordance with § 191.25(b)(2): New York, December 22, 1993
Revokes: T.D. 89–89–D to cover additional factory

(F) Company: Ciba-Geigy Corp.
Articles: Various coal tar dyes in liquid, powder and wetcake form
Merchandise: Various dye intermediates, per T.D. 72–108(3)
Factories: St. Gabriel, LA; Toms River, NJ
Proposal signed: January 6, 1994
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, February 1, 1994

(G) Company: Colortech, Inc.
Articles: Plastic color concentrates
Merchandise: Irganox PS800; hostanox O3
Factory: Morristown, TN
Proposal signed: November 4, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, February 1, 1994

(H) Company: Andrew Crowe & Sons, Inc.
Articles: Rope, cordage and twine
Merchandise: Nylon yarn
Factories: Warren (2), Belfast, Unity, Stockton Springs, Morrill (2) and Thorndike, ME
Proposal signed: August 5, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: Boston, December 3, 1993
Revokes: T.D. 86–125–A

(I) Company: Du Pont Agrichemicals Caribe, Inc.
Articles: Bensulfuron methyl technical a/k/a F5384 technical; "Londax" herbicide formulations
Merchandise: J–290–2 pyrimidinamine, 4, 6 dimethoxy; MCPSI—benzoic acid, 2-(isocyanatosulfonylmethyl)-methyl ester a/k/a INA–7027
Factory: Manati, PR
Proposal signed: October 21, 1993
Basis of claim: Used in
Contract forwarded to RCs of Customs: New York & Miami, February 1, 1994

(J) Company: E.I. DuPont de Nemours & Co.
Articles: FREON© 22
Merchandise: Chloroform
Factories: Louisville, KY; Montague, MI
Proposal signed: June 2, 1993
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Contract forwarded to RCs of Customs: New York & Boston, January 21, 1994

(K) Company: Eastman Kodak Co.
Articles: Sensitized paper; resin coated paper
Merchandise: Polyethylene pellets
Factories: Rochester, NY (4); Windsor, CO
Proposal signed: April 22, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, November 30, 1993

(L) Company: GE Chemicals, Inc.
Articles: Plastic resin in pellet form
Merchandise: Resins (in powder form, beads, chips, or pellets)
Factories: Washington, WV; Ottawa, IL; Oxnard, CA
Proposal signed: June 3, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, December 23, 1993
Revokes: T.D. 88–42–F (Borg Warner Chemicals, Inc.)

(M) Company: Georgia Gulf Corp.
Articles: Polyvinyl chloride resins and compounds
Merchandise: Vinyl chloride monomer; methylmethacrylate butadiene styrene acrylic copolymer (KANE ACE B–28A)
Factories: Plaquemine, LA; Delaware City, DE; Gallman, MS; Tiptonville, TN
Proposal signed: April 13, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, December 23, 1993

(N) Company: Givaudan-Roure Corp.
Articles: Lilial crude for sales (Lilial technical); Lilial pure
Merchandise: Tertiary butyl benzaldehyde (TBB)
Factory: Clifton, NJ
Proposal signed: October 19, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, January 13, 1994
Revokes: T.D. 93–9–G and T.D. 93–9–K

(O) Company: The Goodyear Tire & Rubber Co.
Articles: Tires
Merchandise: Hawkax (N-cyclohexyl-2-benzothiazolesulfenamide)
Factories: Akron OH; Cartersville & Calhoun, GA; Danville, VA; Gadsen, Scottsboro & Decatur, AL; Lawton, OK; Topeka, KS; Union City, TN; Houston, Beaumont Bayport, TX; Niagara Falls, NY; Pt. Pleasant, WV
Proposal signed: September 21, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, December 23, 1993

(P) Company: The Goodyear Tire & Rubber Co.
Articles: Wingstay 29 (an anti-oxidant)
Merchandise: Diphenylamine (LAZAX)
Factories: Akron, OH; Houston, Beaumont & Bayport, TX; Niagara Falls, NY
Proposal signed: September 21, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, January 13, 1994

(Q) Company: Heublein Inc., d/b/a Heublein Wines
Articles: Pasteurized red fruit juice concentrate
Merchandise: Red grape juice concentrate
Factory: Madera, CA
Proposal signed: November 1, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: Long Beach (San Francisco Liquidation Unit), January 13, 1994

(R) Company: Heublein Inc., d/b/a Heublein Wines
Articles: Pasteurized white fruit juice concentrate
Merchandise: White grape juice concentrate
Factory: Madera, CA
Proposal signed: November 1, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: Long Beach (San Francisco Liquidation Unit), January 13, 1994

(S) Company: Osram Sylvania, Inc.
Articles: Sodium tungstate; tungstic acid; ammonium paratungstate; ammonium metatungstate; tungstic oxide; tungsten metal powder; tungsten carbide powder; tungsten cobalt grade mix; various other tungsten products
Merchandise: Tungsten ore concentrate; tungsten scrap
Factories: Towanda, PA; Luquillo, PR; Madisonville, KY; Exeter, NH; Naugatuck, CT; Waldoboro, ME
Proposal signed: November 23, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, February 1, 1994

(T) Company: RMI Titanium Co.
Articles: Titanium bar mill products
Merchandise: Titanium bar
Factory: Niles, OH
Proposal signed: June 2, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, January 12, 1994

(U) Company: Rhône-Poulenc, Inc.
Articles: Acetylsalicylic acid (aspirin) products; methyl salicylate
Merchandise: Salicylic acid
Factory: St. Louis, MO
Proposal signed: December 8, 1993
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative values at the time of separation
Contract forwarded to RC of Customs: New York, December 23, 1993

(V) Company: Shieldalloy Metallurgical Corp.
Articles: Ferrocolumbium
Merchandise: Columbium oxide; columbium metal powder
Factory: Newfield, NJ
Proposal signed: September 13, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, January 13, 1994

(W) Company: Sofix Corp.
Articles: Spiro phathalide xanthene
Merchandise: 2-[2-hydroxy-4-ethyl (3-methylbutyl) aminobenzoyl] benzoic acid; 2-(2-hydroxy-4-dibutylaminobenzoyl) benzoic acid; 2-methyl-4-methoxydiphenylamine
Factory: Chattanooga, TN
Proposal signed: September 8, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, November 26, 1993

(X) Company: Syntex Chemicals, Inc.
Articles: 2-D,L-(6′methoxy-2′naphthyl) propionic acid (D,L-acid); 2-D-(6′methoxy-2′naphthyl) propionic acid salt of 1-deoxy-1-(oxytyl amino)-D-glucitol (NOG–1)
Merchandise: 2-bromo-6-methoxynaphthalene (BMN)
Factory: Boulder, CO
Proposal signed: April 27, 1993
Basis of claim: Used in
Contract forwarded to RC of Customs: Long Beach (San Francisco Liquidation Unit), December 23, 1993
Revokes: T.D. 84–2–W

(Y) Company: Ultrachem Inc.
Articles: Synthetic lubricants
Merchandise: Emkarate ditridecyl adipate
Factory: Wilmington, DE
Proposal signed: September 27, 1991
Basis of claim: Used in
Contract forwarded to RC of Customs: New York, January 13, 1994

(Z) Company: Uniroyal Chemical Co., Inc.
Articles: Flowable fungicide (Cerevax Extra)
Merchandise: Imazalil sulphate; imazalil base; irgalite red C2B; carboxin (Vitavax technical)
Factory: Gastonia, NC
Proposal signed: August 9, 1993
Basis of claim: Appearing in
Contract forwarded to RC of Customs: New York, February 3, 1994

APPROVAL UNDER T.D. 84–49

(1) Company: BP Exploration & Oil, Inc.
Articles: Petroleum and petrochemical products
Merchandise: Crude petroleum and petroleum derivatives
Factories: Marcus Hook, PA; Toledo & Lima, OH; Alliance, LA
Proposal signed: January 3, 1994
Basis of claim: As provided in T.D. 84–49
Contract issued by RC of Customs in accordance with § 191.25(b)(2): Houston, January 18, 1994
Revokes: T.D. 93–62–2 to cover change in factory locations

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19 CFR Parts 12, 102, and 134

(T.D. 94–4)

RULES FOR DETERMINING THE COUNTRY OF ORIGIN OF A GOOD FOR PURPOSES OF ANNEX 311 OF THE NORTH AMERICAN FREE TRADE AGREEMENT; EXTENSION OF COMMENTS

RIN 1515–AB34

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Interim regulations; extension of comment period.

SUMMARY: This document extends the period of time within which interested members of the public may submit comments on interim Customs Regulations for determining the country of origin of certain goods for purposes of Annex 311 of the North American Free-Trade Agreement, as implemented under the North American Free-Trade Agreement Implementation Act (Act) (Public Law 103–182, 107 Stat. 437 (December 8, 1993)). Customs has been requested to extend the comment period to allow additional time to prepare responsive comments. The comment period is extended to July 5, 1994.

EFFECTIVE DATES: Comments must be received on or before July 5, 1994.

FOR FURTHER INFORMATION CONTACT: Sandra L. Gethers, Office of Regulations and Rulings (202–482–6980).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On January 3, 1994, a document was published in the Federal Register (T.D. 94–4, 59 FR 110) containing the interim regulations that represent fulfillment of the obligations of the United States under Paragraph 1 of Annex 311 of the North American Free-Trade Agreement (NAFTA), as implemented under the North American Free-Trade Agreement Implementation act (Act) (Public Law 103–182, 107 Stat. 437 (December 8, 1993)). The document solicited public comments that were to be received on or before April 4, 1994.

Customs has been requested to extend the period of time for comments in order to afford interested parties additional time to study the interim regulations and prepare responsive comment. In view of the extensiveness and importance of the interim regulations, Customs believes that the request for an extension of time should be granted. Accordingly, the period of time for the submission of comments is being extended to July 5, 1994.

Dated: March 3, 1994.

STUART P. SEIDEL,
Acting Director,
Office of Regulations and Rulings.

[Published in the Federal Register, March 11, 1994 (59 FR 11547)]

U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., March 8, 1994.

The following documents of the United States Customs Service, Office of Commercial Operations, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

HARVEY B. FOX,
Director,
Office of Regulations and Rulings.

PROPOSED MODIFICATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF WOMEN'S SUEDE HATS

ACTION: Notice of proposed modification of tariff classification ruling letter.

SUMMARY: Pursuant to section 625(c)(1) of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. 1. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of women's suede hats.

DATE: Comments must be received on or before April 22, 1994.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Commercial Rulings Division, 1301 Constitution Avenue, N.W., (Franklin Court), Washington, D.C. 20229. Comments submitted may be inspected at the Commercial Rulings Division, Office of Regulations and Rulings, located at Franklin Court, 1099 14th St., N.W., Suite 4000, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Bill Conrad, Textile Classification Branch (202–482–7050).

SUPPLEMENTARY INFORMATION:

BACKGROUND

Pursuant to section 625(c)(1) of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling pertaining to the tariff classification of women's suede hats.

In New York Ruling Letter 889480, issued September 15, 1993, by the Area Director of Customs, New York Seaport, four styles of women's suede hats were classified under subheading 4203.10.4095, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for "Articles of apparel and clothing accessories, of leather or composition leather: Articles of apparel: Other, Other: Women's, girls' and infants'." (See ruling letter at "Attachment A" to this document.)

Customs Headquarters is of the opinion that the New York ruling letter (889480) erroneously classified the hats in subheading 4203.10.4095, HTSUSA, and that they are instead classifiable as other headgear under subheading 6506.99.0000, HTSUSA. Heading 6506, HTSUSA, covers, among other things, hats and headgear of leather or composition leather, and such hats are excluded from classification in heading 4203, HTSUSA.

Because New York ruling letter 889480 classified a women's wool hat correctly under subheading 6505.90.4090, HTSUSA, it remains effective to that limited extent. Customs intends to modify the ruling to reflect proper classification for the women's suede hats, as above. Before taking this action, consideration will be given to any written comments timely received. The proposed ruling modifying the New York ruling letter is set forth in "Attachment B" to this document.

Claims for detrimental reliance under section 177.9, Customs Regulations (19 CFR 177.9), will not be entertained for actions occurring on or after the date of publication of this notice.

Dated: March 2, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
New York, N.Y., September 15, 1993.

CLA–2–42, 65:S:N:N5:353 889480
Category: Classification
Tariff No. 4203.10.4095 and 6505.90.4090

MR. JOHN MOTHERSILL
HEAD HUNTERS HAT CO.
2635 West Tenth Ave.
Vancouver, British Columbia V6K 2J8

Re: The tariff classification of women's hats from Canada.

DEAR MR. MOTHERSILL:

In your letter dated August 11, 1993, you requested a tariff classification ruling.

You submitted five photographs of women's hats along with swatches of component materials. *Abigail* is a suede brimmed suede hat with an oval crown and decorated with suede flowers. The crown is lined with cotton fabric. *Jesse* is a suede hat with a round crown and a brim that turns upward. The hat is lined with cotton fabric. *Simone* is a tall suede beret styled hat adorned with soutache cord with a round crown and leather bank that conceals a leather adjustable thong. *Mongolian* is suede hat with large stuffed brim and small rounded crown. The hat is trimmed with soutache cord and lined with cotton. The hat does not have a scarf attached and will not be imported with a scarf. *Sophie* is a wool beret style hat trimmed with a leather band adorned with a leather bow on the side. The hat is not lined.

The applicable subheading for styles, Abigail, Jesse, Simone and Suede Mongolian will be 4203.10.4095, Harmonized Tariff Schedule of the United States (HTS), which provides for articles of apparel and clothing accessories, of leather or of composition leather: Articles of apparel: Other, Other: Women's, girls' and infants'. The rate of duty will be 6 percent ad valorem.

The applicable subheading for style Sophia will be 6505.90.4090, Harmonized Tariff Schedule of the United States (HTS), which provides for hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hair-nets of any material, whether or not lined or trimmed: Of wool: Other, other. The rate of duty will be 33.1 cent/kg + 8.4 percent ad valorem.

Goods classifiable under subheading 4203.10.4095, HTS, which have originated in the territory of Canada, will be entitled to a 3 percent rate of duty and goods classifiable under 6505.90.4090, HTS, will be entitled to a 16.5 cents/kg + 4.2 percent rate of duty under the United States-Canada Free Trade Agreement (FTA) upon compliance with all applicable regulations.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

JEAN F. MAGUIRE,
Area Director,
New York Seaport.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C.

CLA–2 CO:R:C:T 955085 BC
Category: Classification
Tariff No. 6506.99.0000

MR. JOHN MOTHERSILL
HEAD HUNTERS HAT CO.
2635 West Tenth Avenue
Vancouver, British Columbia V6K 2J8

Re: Modification of New York Ruling Letter 889480; classification of women's suede hats; headgear.

DEAR MR. MOTHERSILL:

The Customs Service has had reason to reexamine the classification determination in New York Ruling Letter (NYRL) 889480, dated September 15, 1993, issued to Head Hunters Hat Co. We herein modify that ruling as set forth below.

Facts:

In NYRL 889480, Customs classified 5 styles of women's hats, four under subheading 4203.10.4095 and one under subheading 6505.90.4090 of the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). The four hats classified under heading 4203, HTSUSA, are suede hats. They were described in NYRL 889480 as (1) the Abigail, (2) the Jesse, (3) the Simone, and (4) the Suede Mongolian. The hat classified under heading 6505, HTSUSA, is a wool hat. It was described in the ruling as (5) the Sophia. The latter hat was classified correctly in NYRL 889480. This modification pertains to only the former four hats. Thus, NYRL 889480 remains effective as it pertains to the Sophia.

The four hats reclassified in this ruling are as follows:

(1) The *Abigail* is a suede brimmed hat with an oval crown decorated with suede flowers. The crown is lined with cotton fabric.

(2) The *Jesse* is a suede hat with round crown and a brim that turns upward. The hat is lined with cotton fabric.

(3) The *Simone* is a tall suede beret-styled hat adorned with soutache cord. It has a round crown and leather band that conceals a leather adjustable thong.

(4) The *Mongolian* is a suede hat with a large stuffed brim and a small rounded crown. It is trimmed with soutache cord and lined with cotton.

The above four hats were classified in NYRL 889480 under subheading 4203.10.4090, HTSUSA, which provides for "Articles of apparel and clothing accessories, of leather or of composition leather: Articles of apparel: Other, Other: Women's, girls' and infants'." The applicable duty rate was 6% *ad valorem*.

The classification of the above hats in heading 4203, HTSUSA, was in error. The Explanatory Notes (EN's) for heading 42.03 provide that "[h]eadgear or parts thereof, of Chapter 65," HTSUSA, are excluded from the heading. (See the EN's for heading 42.03, Harmonized Commodity Description and Coding System, Vol. 2, p. 614, item (d) under heading exclusions.) This EN clearly indicates that hats of Chapter 65, HTSUSA, are not within the scope of heading 4203, HTSUSA.

Chapter 65, HTSUSA, covers headgear and parts thereof. The EN's for the chapter provide that "this chapter covers hat-shapes, hat-forms, hat bodies and hoods, and hats and other headgear of all kinds, irrespective of the materials of which they are made and of their intended use (daily wear, theater, disguise, protection, etc.). (See En's, Chapter 65, General, Harmonized Commodity Description and Coding System, Vol. 3, p. 881.) Heading 6506, HTSUSA, covers other headgear, whether or not lined or trimmed. The EN's for heading 65.06 provide the following: "The heading also covers: * * * (2) Hats and headgear of leather or composition leather." (See EN's for heading 65.06 Harmonized Commodity Description and Coding System, Vol. 3, p. 885.)

Based on the foregoing, we conclude that the suede hats at issue are classifiable under heading 6506, HTSUSA. As such, they are excluded from classification in heading 4203, HTSUSA.

Holding:

The suede women's hats at issue are classifiable under subheading 6506.99.0000, HTSUSA, as "Other headgear, whether or not trimmed: Other: of other materials." The applicable rate of duty is 8.5% *ad valorem*.

Pursuant to 19 CFR 177.9(d), NYRL 889480, dated September 15, 1993, is hereby modified.

JOHN DURANT,
Director,
Commercial Rulings Division.

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19 CFR Part 177

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF AN ADULT DIAPER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625 Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is revoking a ruling letter concerning the tariff classification of an adult diaper. Notice of the proposed revocation was published January 26, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 4.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after May 23, 1994.

FOR FURTHER INFORMATION CONTACT: Monika Rice, Office of Regulations and Rulings, Special Classification Branch, 202–482–6980.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On January 26, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 4, proposing to revoke New York Ruling Letter (NYRL) 883811, issued April 16, 1993, by the Area Director of Customs, New York Seaport, concerning the classification of an adult diaper in subheading 6108.21.0010, Harmonized Tariff Schedule of the United States (HTSUS). No comments were received. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), this notice advises interested parties that Customs is revoking NYRL 883811 to reflect the proper classification of the product in subheading 9817.00.96, HTSUS, which, in part, implements the Nairobi Protocol to the Agreement on the Importation

of Educational, Scientific, and Cultural Materials Act of 1982, establishing the duty-free treatment for certain articles for the handicapped. The ruling revoking NYRL 883811 is set forth in Attachment A to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: March 8 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., March 8, 1994.

CLA-2 CO:R:C:S 557529 MLR
Category: Classification
Tariff No. 9817.00.96

MS. SUSAN A. SCHRETER
PRESIDENT
CARING PRODUCTS INTERNATIONAL INC.
315 East 86th Street
Suite 3PE
New York, New York 10028

Re: Eligibility under the Nairobi Protocol; specially designed or adapted for the handicapped; adult diaper; incontinence; New York Ruling Letter (NYRL) 883811; revocation.

DEAR MS. SCHRETER:

This is in reference to your letter of July 30, 1993, requesting reconsideration of New York Ruling Letter (NYRL) 883811 dated April 16, 1993, to examine adult diapers for possible duty-free treatment under subheading 9817.00.96, Harmonized Tariff Schedule of the United States (HTSUS). A sample was submitted with your request, as well as a sample of a competitor's diaper. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of NYRL 883811 was published January 26, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 4.

Facts:

The article at issue is referred to as an "institutional adult diaper" ("diaper") which allegedly is designed to effectively manage serious, chronic incontinence problems, and, therefore, specifically benefit health care institutions and the chronically incontinent patients they serve. The diaper consists of a light-weight, durable stretch cotton or polyester shell with a water-resistant elasticized "channel" system which is formed from either porous polyester or cotton fabric stitched over the center of the diaper. The diaper with its channel system is used with a super-absorbent, ultra-thin and disposable insert pad that is sold separately from the diaper and which is not imported. The channel secures the pad without pins, adhesive tape, snaps, belts, or other attachment devices. The patent-pend-

ing channel is stated to serve as a temporary container for moisture not yet absorbed by the pad or as a final barrier against leaks if the pad is filled to capacity. The diaper is stated to be washable, breathable, and provides discreet protection for both men and women. The diaper and the disposable insert pad will be marketed to hospitals, nursing homes, and acute and sub-acute health care facilities. The diaper will be imported from Canada.

Issue:

Whether the adult diaper is "specially designed or adapted" for the handicapped within the meaning of the Nairobi Protocol, and, therefore, eligible for duty-free treatment under subheading 9817.00.96, HTSUS.

Law and Analysis:

The Nairobi Protocol to the Agreement on the Importation of Educational, Scientific, and Cultural Materials Act of 1982, established the duty-free treatment of certain articles for the handicapped. Presidential Proclamation 5978 and Section 1121 of the omnibus Trade and Competitiveness Act of 1988, provided for the implementation of the Nairobi Protocol into subheadings 9817.00.92, 9817.00.94, and 9817.00.96, HTSUS. These tariff provisions specifically state that "[a]rticles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons" are eligible for duty-free treatment.

U.S. Note 4(a), subchapter XVII, Chapter 98, HTSUS, states that, "the term *'blind or other physically or mentally handicapped persons'* includes any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, or working."

U.S. Note 4(b), subchapter XVII, Chapter 98, HTSUS, which establishes limits on classification of products in these subheadings, states as follows:

(b) Subheadings 9718.00.92, 9817.00.94, and 9817.00.96 do not cover—

(i) articles for acute or transient disability;

(ii) spectacles, dentures, and cosmetic articles for individuals not substantially disabled;

(iii) therapeutic and diagnostic articles; or

(iv) medicine or drugs.

We have previously ruled that a person suffering from chronic incontinence is physically handicapped as that term is defined in U.S. Note 4(a) to Subchapter XVII. *See* Headquarters Ruling Letter (HRL) 085092 dated May 10, 1990; and HRL 085094 dated May 10, 1990. Therefore, the primary issue regarding the article at issue is whether it is "specially designed or adapted" for the use or benefit of the handicapped within the meaning of the Nairobi Protocol.

In NYRL 883811, the diaper was classified under subheading 6108.21.0010, HTSUS, which provides for: Women's or girls' slip, petticoats, brief, panties, * * * and similar articles, knitted or crocheted: briefs and panties: of cotton, women's. You now request that this ruling be revoked and that the diaper be reclassified under subheading 9817.00.96, HTSUS. NYRL 883811 compared the diaper with an incontinent pant classified under subheading 9817.00.96, HTSUS, in HRL 085691 dated April 18, 1990. In HRL 085691, the sample was a brief with an outer shell of knit polyester fabric with a green vinyl covering, a liner, and an interlining. The brief was secured for wear by metal snaps which could be adjusted for fit. When fitted and worn properly, the outer shell fabric prevented leakage. It was stated that this garment is used by persons suffering from a permanent or chronic impairment, as opposed to an acute or transitory impairment. In contrast, the diaper in NYRL 883811 and at issue here, did not appear to be similar to the heavy multi-layered brief described in HRL 085691 or suitable for chronically or permanent incontinent individuals, but rather appeared to provide some protection when used with a pad and be of the type used for postpartum or postoperative therapy and relatively mild incontinence problems.

We have also considered several other cases involving adult diapers. *See* HRL 088279 dated March 5, 1991; HRL 088761 dated March 5, 1991; and HRL 085092 dated May 10, 1990. In each of these rulings, the diapers were similar to the one in HRL 085691, in that some sort of vinyl was used to prevent leakage. In HRL 085092, it was also pointed out that the expense associated with purchasing and properly caring for the med-i-brief would not make it feasible for an individual to use with acute or transitory incontinence based on cost alone. This ruling also reconsidered NYRL 846983 dated December 5, 1989, which

classified a containment pad under subheading 6210.50.2050, HTSUS. In all of these rulings, it was found that the article under consideration was durable and well constructed, and designed for long-term use over a long period of time, as opposed to a disposable incontinent care product.

In this case, we also find the diaper to be durable and well constructed, and designed for repeated use over a long period of time. Although the diaper is not as bulky as the heavy multilayered brief described in HRL 085691, this alone does not mean that the diaper is not suited for individuals with chronic or permanent incontinence. As we stated in HRL 556532 dated June 18, 1992, in regard to some canes which were stylish and had an attractive permanized finish, there is no restriction on articles for the handicapped being "stylish"; however, if style dominates as the essential character of the article, this is a significant indication that it is not an article for the handicapped. Here, the diaper does not have to be bulky to be effective. Furthermore, although the diaper does not have a vinyl coating or lining as in the rulings above, the channel system is composed of a porous polyester fabric which prevents leakage. NYRL 883811 also noted that the diaper may be used for relatively mild incontinence problems. These problems may nonetheless be permanent and chronic, and the fact that the diaper could be used for postpartum or postoperative therapy does not disqualify it from subheading 9817.00.96, HTSUS, treatment.

Holding:

On the basis of the information and sample submitted, the adult diaper is considered to be an article specially designed or adapted for the handicapped, and, therefore, eligible for duty-free treatment under subheading 9817.00.96, HTSUS.

NYRL 883811 dated April 16, 1993, is hereby revoked.

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 623 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director,
Commercial Rulings Division.

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19 CFR Part 177

REVOCATION OF CUSTOMS RULING LETTER RELATING TO TARIFF CLASSIFICATION OF DRINK PREMIX

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of tariff classification ruling letter.

SUMMARY: Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993), this notice advises interested parties that Customs is revoking a ruling letter concerning the tariff classification of a drink premix. Notice of the proposed revocation was published January 26, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 4.

EFFECTIVE DATE: Merchandise entered or withdrawn from warehouse for consumption on or after May 23, 1994.

FOR FURTHER INFORMATION CONTACT: Lenny Feldman, Food and Chemicals Classification Branch, Office of Regulations and Rulings (202) 482–7020.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On January 26, 1994, Customs published a notice in the CUSTOMS BULLETIN, Volume 28, Number 4, proposing to revoke New York Ruling Letter (NYRL) 863718, issued June 19, 1991, by the Area Director of Customs, New York Seaport, concerning the tariff classification of a drink premix in subheading 2106.90.5050, Harmonized Tariff Schedule of the United States Annotated (HTSUSA). Four comments were received. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), this notice advises interested parties that Customs is revoking NYRL 863718 to reflect proper classification of the product in subheading 1702.90.31 or 1702.90.32, HTSUSA, which provides for other sugars, sugar syrups not containing added flavoring or coloring matter, other, derived from sugar cane or sugar beets, dependent on whether the product is described in paragraphs (a) and (b) of additional U.S. note 3 to chapter 17, HTSUSA. Our response to the comments received is reflected in the ruling revoking NYRL 863718, a copy of which is set forth in Attachment A to this document.

Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

Dated: March 8, 1994.

JOHN DURANT,
Director,
Commercial Rulings Division.

[Attachment]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, D.C., March 8, 1994.

CLA–2 CO:R:C:F 955641 LPF
Category: Classification
Tariff No. 1702.90.31, 1702.90.32, and 9904.40.60

MR. BRUCE SHULMAN
STEIN SHOSTAK SHOSTAK & O'HARA
Suite 807
1620 L Street, NW
Washington, D.C. 20036–5605

Re: Revocation of NYRL 863718; Classification of drink premix in 1702, HTSUS as other sugars, sugar syrups not containing added flavoring or coloring matter; Not 2106 food preparation.

DEAR MR. SHULMAN:

In New York Ruling Letter (NYRL) 863718, issued June 19, 1991, a drink premix, imported from Canada, was classified in subheading 2106.90.5050, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), as food preparations not elsewhere specified or included, other, subject to quota in subheading 9904.60.60, HTSUSA. In your letter, dated November 15, 1993, it was stated that you have been retained as counsel by Cando Apple Ltd., the party on whose behalf NYRL 863718 was issued. We have reviewed that ruling and have found it to be in error. The correct classification is as follows. Pursuant to section 625, Tariff Act of 1930 (19 U.S.C. 1625), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub. L. 103–182, 107 Stat. 2057, 2186 (1993) (hereinafter section 625), notice of the proposed revocation of NYRL 863718 was published January 26, 1994, in the CUSTOMS BULLETIN, Volume 28, Number 4.

Facts:

The product, described as a drink premix, is imported in bulk tanks and used as the base ingredient in the production of a beverage mix. It is our current understanding, from information submitted by the importer, that the product typically includes approximately 50% water, 50% beet or cane sugar, and 0.00345% natural apple flavor. A Customs Laboratory Report, dated April 6, 1993, found four samples of the product to contain 0.002, 0.0012, 0.0015, and 0.0017% volatile components by weight. The lab was unable to confirm the identities of these components as apple flavor.

Issue:

Whether the drink premix is classifiable within heading 2106 as a food preparation not elsewhere specified or included or within heading 1702 as a sugar syrup not containing added flavoring or coloring matter.

Law and Analysis:

The General Rules of Interpretation (GRIs) taken in their appropriate order provide a framework for classification of merchandise under the HTSUS. Most imported goods are classified by application of GRI 1, that is, according to the terms of the headings of the tariff schedule and any relative section or chapter notes. The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System, which represent the official interpretation of the tariff at the international level, facilitate classification under the HTSUS by offering guidance in understanding the scope of the headings and GRIs.

Heading 2106 provides for food preparations not elsewhere specified or included, while heading 1702 provides for sugar syrups not containing added flavoring or coloring matter. EN(12) to 2106 indicates that the heading includes:

> [p]reparations for the manufacture of lemonades or other beverages, consisting, for example, of:
>
> flavoured or coloured syrups, being sugar solutions with natural or artificial substances added to give them the flavour of, for example, certain fruits or plants (raspberry, blackcurrant , lemon, mint, etc.), whether or not containing added citric acid and preservatives * * * .

In contrast, the EN to 1702 indicates that the heading includes:

> [s]yrups of all sugars * * * provided they do not contain added flavouring or colouring matter * * * .

Customs maintains that in order to be considered a flavored syrup, an imported article must contain an added flavoring substance and that substance should be in sufficient quantity to impart the flavor's unique organoleptic characteristics. In this case, inspection of the product by Customs officials, including laboratory analysis as well as information from the importer indicating that the product typically contains 0.00345% natural apple flavor, has revealed that the added flavoring material is in such small quantity as to impart no viable organoleptic characteristics such as aroma and flavor. Its presence is viewed as *de minimis*. *See* General Note 16, HTSUSA, stating that the term "containing," when used between the description of an article and a material, means that the goods contain a significant quantity of the named material and that with regard to the application of such quantitative concepts, the *de minimis* rule applies. The product does not qualify as a "flavored" syrup for the preparation of beverages and consequently is not classifiable as a food preparation.

Pursuant to a GRI 1 analysis, the terms of the headings and relevant EN indicate that the drink premix is appropriately classified within heading 1702 as a sugar syrup not containing added flavoring or coloring matter. The appropriate subheadings are 1702.90.31 and 1702.90.32, HTSUSA, dependent on whether the product is described in paragraphs (a) and (b) of additional U.S. note 3 to chapter 17, HTSUSA.

Holding:

The drink premix, entered pursuant to Notes 3(a) and 3(b), is classifiable in subheading 1702.90.3100, HTSUSA. The general column one rate of duty is 1.4606 cents per kilogram less 0.020668 cent per kilogram for each degree under 100 degrees (and fractions of a degree in proportion) but not less than 0.943854 cent per kilogram.

If not entered pursuant to Notes 3(a) and 3(b), the drink premix is classifiable in subheading 1702.90.3200, HTSUSA. The general column one rate of duty is 37.386 cents per kilogram.

In addition, subheading 9904.40.60, HTSUSA, provides that, in any event, if the product is classifiable in either subheading, it carries a supplemental agricultural import fee of 2.2 cents per kilogram of the total sugars, but not in excess of 50 percent.

Products entering the United States under subheading 1702.90.31 or 1702.90.32 must be accompanied by a Certificate of Quota Eligibility (CQE) executed by an official of a designated certifying authority (e.g., either a government authority or a designated commercial authority) in the country of origin. This instrument requires that the product originate in the country of export and that it not merely be a product transhipped through the country issuing the CQE.

NYRL 863718 hereby is revoked.

In accordance with section 625, this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to section 625 does not constitute a change of practice or position in accordance with section 177.10.(c)(1), Customs Regulations (19 CFR 177.10(c)(1)).

JOHN DURANT,
Director
Commercial Rulings Division.

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 4, 10, 12, 102, 134, and 177

RULES OF ORIGIN APPLICABLE TO IMPORTED MERCHANDISE; EXTENSION OF COMMENTS

RIN 1515–AB19

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking; extension of comment period.

SUMMARY: This document extends the period of time within which interested members of the public may submit comments on proposed amendments to the Customs Regulations setting forth uniform rules governing the determination of the country of origin of imported merchandise. Customs has been requested to extend the comment period to allow additional time to prepare responsive comments. The comment period is extended to July 5, 1994.

EFFECTIVE DATES: Comments must be received on or before July 5, 1994.

FOR FURTHER INFORMATION CONTACT: Sandra L. Gethers, Office of Regulations and Rulings (202–482–6980).

SUPPLEMENTARY INFORMATION:

BACKGROUND

On January 3, 1994, a document was published in the Federal Register (59 FR 141) containing proposed amendments to the Customs Regulations setting forth uniform rules governing the determination of the country of origin of imported merchandise. The document solicited public comments that were to be received on or before April 4, 1994.

Customs has been requested to extend the period of time for comments in order to afford interested parties additional time to study the proposed regulations and prepare responsive comment. In view of the extensiveness and importance of the proposed regulations, Customs believes that the request for an extension of time should be granted. Accordingly, the period of time for the submission of comments is being extended to July 5, 1994.

Dated: March 3, 1994.

STUART P. SEIDEL,
Acting Director,
Office of Regulations and Rulings.

[Published in the Federal Register, March 15, 1994 (59 FR 11225)]

U.S. Court of Appeals for the Federal Circuit

CRESWELL TRADING CO., INC., SOUTH BAY FOUNDRY 1989, D & L SUPPLY CO., SOUTHERN STAR, INC., VIRGINIA PRECAST CORP, AND TECHSALES, INC., PLAINTIFFS, AND CITY PIPE & FOUNDRY, INC., AND CAPITOL FOUNDRY OF VIRGINIA, INC., PLAINTIFFS-APPELLANTS, AND CRESCENT FOUNDRY CO. P. LTD., SELECT STEELS, LTD., R.B. AGARWALLA & CO., SERAMPORE INDUSTRIES P., LTD., SUPER CASTINGS (INDIA), CARNATION ENTERPRISES P., LTD., UMA IRON & STEEL CO., AND COMMEX CORP, PLAINTIFFS-APPELLANTS *v.* UNITED STATES, DEFENDANT-APPELLEE, AND ALLEGHENY FOUNDRY CO., DEETER FOUNDRY, INC., EAST JORDAN IRON WORKS, INC., LEBARON FOUNDRY, INC., MUNICIPAL CASTINGS, INC., NEENAH FOUNDRY CO., U.S. FOUNDRY & MANUFACTURING CO., VULCAN FOUNDRY, INC., AND ALHAMBRA FOUNDRY, INC., DEFENDANTS-APPELLEES

Appeal No. 93–1062 and 93–1066

(Decided February 2, 1994)

Dennis James, Jr., Whitman & Ransom, of Washington, D.C., argued for plaintiffs-appellants. With him on the brief was *Kathleen F. Patterson.*

Christopher A. Dunn and *Walter J. Spak*, Willkie, Farr & Gallagher, of Washington, D.C., were on the brief for plaintiffs-appellants, City Pipe & Foundry, Inc. and Capitol Foundry of Virginia, Inc.

Velta A. Melnbrencis, Assistant Director, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellee, The United States. With her on the brief were *Stuart M. Gerson*, Assistant Attorney General and *David M. Cohen*, Director. Also on the brief was *Robert C. Nielsen*, Senior Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of counsel. *Paul C. Rosenthal*, Collier, Shannon, Rill & Scott, of Washington, D.C., argued for defendants-appellees, Allegheny Foundry Co., et al. With him on the brief was *Robin H. Gilbert.*

Appealed from: U.S. Court of International Trade.
Judge DICARLO.

Before NIES, *Chief Judge,* RICH, and LOURIE, *Circuit Judges.*

RICH, *Circuit Judge.*

Appellants[1] appeal an August 28, 1992 decision of the Court of International Trade (CIT), *Creswell Trading Co. v. United States,* 797 F. Supp. 1038 (Ct. Int'l Trade 1992), sustaining a Department of Commerce (Commerce) determination countervailing the entirety of certain

[1]City Pipe & Foundry, Inc., Capitol Foundry of Virginia, Inc., Crescent Foundry Co. P. Ltd., Select Steels, Ltd., R.B. Agarwalla & Co., Serampore Industries P., Ltd., Super Castings (INDIA), Carnation Enterprises P., Ltd., Uma Iron & Steel Co., and Commex Corporation (collectively "Appellants") are Indian exporters of iron-metal castings who participated as plaintiffs-intervenors before the CIT.

rebates provided by the Indian government pursuant to India's International Price Reimbursement Scheme (IPRS)[2] to exporters of iron-metal castings[3] for the period from January 1, 1985 to December 31, 1985. For the reasons set forth below, we reverse and remand.

The CIT and Commerce have failed to recognize the appropriate burdens of proof and production to be applied in the type of countervailable duty inquiry at issue herein. Although the ultimate burden of proving countervailability in this case rested with Commerce, the existence of India's IPRS program by itself constituted presumptive evidence that the IPRS rebates were countervailable. The evidence relied upon by Appellants, however, sufficiently rebutted this presumption. Thus, the burden of production shifted back to Commerce to prove that this evidence was either inaccurate or insufficient, which it failed to do. On this basis alone, reversal is required. Nevertheless, the CIT also erred in failing to recognize the inherent procedural unfairness in Commerce's ruling that the evidence of record was too ambiguous and deficient for it to render a decision, given that Commerce had indicated during the initial stage of its investigation that it need not consider the type of evidence that it later found missing and given that Commerce indicated affirmatively during a later stage of its investigation that it had all of the information it needed.

I

The CIT had jurisdiction to consider this case pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iii) (1988) and 28 U.S.C. § 1581(c) (1988). We therefore have jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(5) (1988).

The issue before us is whether the CIT erred in sustaining Commerce's ruling that the IPRS rebates India made to its exporters in 1985 were countervailable in their entirety. In reviewing Commerce's ruling, the CIT was guided by a statutory standard of review which provided that Commerce's ruling should be held unlawful if it was "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1988). To determine whether the CIT correctly applied this standard in reaching its decision, we must apply anew this statutory standard of review to Commerce's ruling and affirm the CIT unless we conclude that Commerce's ruling is not supported by substantial evidence on the record or is otherwise not in accordance with the law. *Nitta Indus. Corp. v. United States*, 997 F.2

[2] The IPRS was introduced in 1981 by the Government of India. Under the IPRS, users of domestically produced steel, pig iron, or scrap, as raw materials, are entitled upon export of a finished product to a refund equal to the difference between the higher cost of the Indian-produced raw material and the cost of that same raw material if purchased internationally.

[3] For purposes of this opinion, we refer to the products under investigation as "castings." Commerce described these products generally in a previous decision, not under review here, as follows:

> Imports covered by the review are shipments of Indian manhole covers and frames, clean-out covers and frames, and catch basin grates and frames. These articles are commonly called municipal or public works castings and are used for access or for drainage for public utility, water, and sanitary systems.

Certain Iron-Metal Castings from India; Final Results of Countervailing Duty Administrative Review ("First Commerce Determination") 55 Fed. Reg. 50747 (Dec. 10, 1990).

1459, 1460 (Fed. Cir. 1993); *see also PPG Indus., Inc. v. United States*, 978 F.2d 1232, 1236 (Fed. Cir. 1992); *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1189 (Fed. Cir. 1990); *Atlantic Sugar, Ltd. v. United States*, 744 F.2d 1556, 1559 n.10 (Fed. Cir. 1984). "Substantial evidence is more than a mere scintilla. It means such relevant evidence [considering the record as a whole] as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co., Ltd. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984).

II

On December 10, 1990, Commerce issued a first determination that the 1985 IPRS rebates were countervailable in their entirety. *First Commerce Determination*, 55 Fed. Reg. 50747. Commerce stated that it was "irrelevant" whether the 1985 IPRS rebates were consistent with Item (d) of the Illustrative List of Export Subsidies ("Illustrative List") annexed to the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (GATT).[4] Item (d) provides that the following is considered to be a subsidy:

> (d) The delivery by governments or their agencies of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for delivery of like or directly competitive products or services for use in the production of goods for domestic consumption, *if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.* [Emphasis ours.]

H.R. Doc. No. 153, Pt. I, 96th Cong., 1st Sess. 295 (1979).

More specifically, Commerce stated in this first determination:

> We consider a government program that results in the provision of an input to exporters at a price lower than to producers of domestically-sold products to confer a subsidy within the meaning of section 771(5). It is irrelevant whether the IPRS is consistent with [I]tem (d) because we are not concerned with world market prices but with the alternative price of pig iron commercially available in the domestic market.

First Commerce Determination, 55 Fed. Reg. at 50749. Commerce believed that it need not defer to Item (d) because section 771(5) of the Tariff Act grants Commerce the authority to find subsidies outside those situations specifically set forth in the Illustrative List. The CIT disagreed.

In a decision dated January 31, 1992, the CIT overruled Commerce's first determination, holding that "Commerce must examine the IPRS in light of the exception to countervailable subsidies provided in [I]tem (d)." *Creswell Trading Co. v. United States*, 783 F. Supp. 1418, 1419 (Ct.

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[4] "The list in question is a list prepared under the [GATT] which, by 19 U.S.C. §§ 2502(1) and 2503(c)(5), the Congress incorporated into United States Law." *RSI (India) Pvt., Ltd. v. United States*, 876 F.2d 1571, 1572 (Fed. Cir. 1989).

Int'l Trade 1992). The CIT reasoned that Commerce must consider Item (d) because Item (d) explicitly addresses the type of situation at issue in this case. The CIT logically concluded that Commerce's authority to find subsidies in situations not specifically listed in the Illustrative List extends only to those situations which do not fall into one of the specific situations listed. Thus, the CIT refused to allow Commerce to rely on its alleged broad authority under the Tariff Act to circumvent the explicit provisions of Item (d). Accordingly, the CIT remanded with a specific order to Commerce to "examine the IPRS in light of [I]tem (d) and determine whether the Indian government's provision of pig iron was on terms more favorable than on world markets." *Creswell,* 783 F. Supp. at 1420–21.

On February 26, 1992, Commerce issued a *Draft Redetermination on Remand, Final Results of Countervailing Duty Administrative Review ("Draft Remand Determination"),* which was released to all parties for comment, and in which Commerce stated that it "had found enough information to try to determine whether the IPRS program was consistent with the [I]tem (d) exception." *Final Remand Determination* at 3. Commerce described therein its methodology for analyzing the IPRS payments for countervailability upon remand as follows:

> In determining whether IPRS payments qualify for the [I]tem (d) exception as interpreted by the Court [CIT], the Department attributed a countervailable benefit from the IPRS equal to the amount of the overrebate of the differential between the Indian domestic price of pig iron and the international price of pig iron.

Draft Remand Determination at 2. Although the foregoing adequately describes the appropriate calculation to be carried out, Commerce inadvertently miscalculated the "overrebate" due to Commerce's understandable confusion regarding the pricing data that the Indian government provided it. Commerce's confusion resulted from the Indian government's use of the terminology "international price" in its August 26, 1987 questionnaire response to refer to two different items, namely, the price at which the Indian government believed pig iron could be purchased internationally, i.e., at terms and conditions available on world markets, and the post-rebate price of domestically-produced pig iron established by the Indian government.

The Indian government provided a table in this questionnaire response which, pursuant to a header therein, purported to provide "international price" information for pig iron during 1985 on a monthly basis. Following this table, the Indian government provided an explanation as to how it arrived at these 1985 prices as follows:

> Since no price quotation is available in any international journal or metal bulletins for determining *international price* of pig iron, it was decided in 1983 that the price quoted to Steel Authority of India, Ltd. [SAIL] (which is a public sector unit and through which imports of steel and pig iron was canalised at that time) should be the basis for calculating the *international prices.* On the basis of contracts entered into by SAIL for import of pig iron in 1983, the

> *international price* was determined at $126 per metric ton FOB. The international prices for pig iron for the period January to October, 1985 were based on the rate of $126 per metric ton FOB and an element on account of excise duty was added to those prices. The variations in the prices were on account of exchange rate fluctuations between the US dollar and the Indian rupee. The *international prices* were reviewed by the Standing Committee headed by the Chief Controller of Imports and Exports and it was found that the *international price* at the rate of $126 per metric ton FOB was in fact on the higher side as compared to the price quoted to the tender floated by MMTC [Minerals and Metals Trading Company] and opened in October, 1985. The Committee, however, decided to maintain the *international price* at US$ 126 per metric ton FOB and not to lower it to the price quoted to MMTC viz. US$ 113 per metric ton at higher rates under the IPRS in respect of pig iron used for exports of engineering goods. For the period from November to December, 1985, the *international price* for iron was fixed on the basis of quotations received by MMTC viz. US$ 113 per metric ton.

Questionnaire Response at pages 14–15 (emphasis added).

The foregoing illustrates the Indian government's loose usage of the language "international price." Upon close analysis, it is evident that the $ 126 and $ 113 price quotes in the excerpt represent the prices at which the Indian government believed it could purchase pig iron internationally. It is equally evident that the "international price" information provided in the table represents the post-rebate price of domestically-produced pig iron established by the Indian government. Unfortunately, due to the Indian government's loose usage of the terminology "international price," Commerce believed the opposite, namely that the pricing information in the table represented the price at which the Indian government believed pig iron could be purchased internationally and that the $ 126 and $ 113 price quotes represented the post-rebate price established by the Indian government.[5] Consequently, in calculating whether a subsidy existed, Commerce mistakenly subtracted the price at which pig iron could be purchased internationally from the post-rebate price of pig iron established by the Indian government, instead of vice versa. Following issuance of its draft remand determination, Commerce received several letters advising it that it had misinterpreted the pricing data that the Indian government had provided.

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[5]The following description of the calculation that Commerce carried out in its draft remand determination to determine whether a countervailable subsidy existed evidences Commerce's error:

> (1) For each month of 1985, the record contains an "international" metric ton price of pig iron. The basis for these "international" pig iron prices are arm's-length quotes solicited by the Steel Authority of India Ltd. (SAIL), which is a public agency that oversees the import of pig iron. (These price quotes were provided by SAIL on page 14 of the questionnaire response.)
>
> (2) For each month of 1985, the record contains the Engineering and Export Council's (EEPC) reference price in metric tons. This is the price that the EEPC uses to calculate the amount of IPRS reimbursement. (These reference prices were provided by the EEPC on page 15 of the questionnaire response and are cited on page 2 of the verification report.)
>
> (3) For each month, we subtracted the EEPC areference price from the international price. If the difference is positive, an overrebate exists. That is, if the EEPC reference price is less than the international price, the net cost of pig iron to the exporter is less than the international price of pig iron and hence preferential.

Draft Remand Determination at 2.

On March 16, 1992, after reviewing the record already established and without requesting any additional information from the Indian government or Appellants, Commerce issued a final, second determination in which Commerce found that the record evidence was "ambiguous" and "woefully deficient to support any claim * * * that the IPRS program is consistent with the so-called world-market price exception under [I]tem (d)." *Redetermination on Remand/Final Results of Countervailing Duty Administrative Review Pursuant to Court Remand/Certain Iron-Metal Castings from India ("Final Remand Determination")* at 4. Consequently, because the alleged ambiguity and deficiency of the record evidence made it impossible for Commerce "to determine whether the IPRS program is consistent with the world market price exception in [I]tem (d)," Commerce ruled that the IPRS rebates made in 1985 were direct export subsidies which were countervailable in their entirety. *Final Remand Determination* at 10.

On August 28, 1992, the CIT affirmed Commerce's final remand determination that the 1985 IPRS rebates were countervailable in their entirety and dismissed the proceeding. In reaching this decision, the CIT accepted Commerce's interpretation that Item (d) provides an "exception" to countervailability for goods that are not provided on terms or conditions that are more favorable than those commercially available to exporters on world markets, and that, as a result, Item (d) imposes a burden on an exporter to "establish" a singular "world market price" before that exporter may claim the benefit of the Item (d) exception. *Creswell,* 797 F. Supp. at 1040–41. Going forward from this premise, the CIT held that there was substantial evidence of record to support Commerce's determination that Appellants had "failed to carry their burden of proof" regarding the "world market price" during the relevant period. *Creswell,* 797 F. Supp. at 1041.[6]

III

A. *Burdens of Proof and Production*

(1) *Applicable Burdens*

At the heart of this case lie the intertwining issues of who bears the ultimate burden of proof of establishing the existence of a countervailable subsidy pursuant to Item (d) and of what the appropriate procedural burdens of production are during the course of a Commerce investigation to determine if such a countervailable subsidy exists. By "burden of proof," we mean the ultimate burden of persuasion in convincing a fact finder of the existence of a countervailable subsidy. By "burden of production," we mean the burden of going forward. Because there is no statutory or regulatory guidance, the appropriate standard of proof in an Item (d) analysis is by a preponderance of the evidence. The proper allocation of the burdens of proof and production are important procedural rights that may have substantive consequences, and there-

[6] Of interest, this court previously affirmed a CIT decision upholding a Commerce determination the IPRS rebates made in 1984 were countervailable subsidies based on the record established in that 1984 review. *RSI,* note 4, *supra.*

fore we find it necessary to consider Commerce's assignment of these burdens as part of our review to determine whether Commerce's ruling in this case was "in accordance with law."[7]

Neither Appellants nor Appellees have pointed to any explicit statutory or regulatory allocation of the burdens of proof or production with respect to establishing the existence of a countervailable subsidy under Item (d). However, Item (d) itself is enlightening on this point. As noted *supra*, Item (d) provides that the following is considered to be a subsidy:

> (d) *The delivery* by governments or their agencies of imported or domestic *products* or services for use in the production of *exported* goods, on terms or conditions *more favourable* than for delivery of like or directly competitive products or services for use in the production of goods for *domestic* consumption, *if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.* [Emphasis added.]

The "if" clause of Item (d) sets forth on its face a statutory condition that Commerce must establish before it may exercise its right to levy a countervailing duty against an investigated party, as opposed to an exception into which that party must prove its actions fall. The ultimate burden of proof is thus upon Commerce to establish by a preponderance of the evidence that a government, or an agency thereof, has delivered to an exporter products or services for use in the production of *exported* goods on terms or conditions more favorable than those commercially available to the exporter on world markets.

Typically, the burden of production is initially upon the party who bears the ultimate burden of proof and generally requires that a party produce sufficient evidence to support a finding in favor of that party. The burden of production then shifts to the other party, who must in turn produce enough evidence to raise a question of material fact. However, in the context of an Item (d) investigation, Commerce necessarily requires information that is within the knowledge and control of the government of the exporting country, its exporters, or both, which information Commerce cannot obtain independently. For example, Commerce has need of information regarding the terms and conditions at which the government provided the exporter with the services or products under investigation, how the government arrived at these terms and conditions, and how these terms or conditions compared to the terms and conditions at which a domestic seller of the exported goods could obtain these services or products. Thus, it is only logical that some burden be placed on the government or exporter to come forward with such information. *See Zenith Elec. Corp. v. United States*, 988 F.2d 1573, 1583 (Fed. Cir. 1993) ("The burden of production should belong to the party in possession of the necessary information.")

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[7] Appellees suggest that this court should not involve itself in a burden of proof analysis because Appellants' allegedly did not raise arguments on this point below. We disagree. The issue of who bears the burdens of proof and production has been at the heart of this dispute all along, and we can not turn a blind eye to this issue.

To this end, we hold that the existence of a program wherein a government, or an agency thereof, delivers to an exporter products or services for use in the production of exported goods on terms or conditions more favorable than for delivery of like or directly competitive products or services for use in the production of goods for domestic consumption is, standing alone, presumptive evidence that the program also provides the products or services under investigation to that exporter on terms or conditions more favorable than the terms and conditions available on world markets. Commerce's initial burden of production is thus satisfied by way of this presumption. The burden of production accordingly shifts to the exporter to come forward with evidence that the services or products were not provided on terms or conditions more favorable than available on world markets.

We do not hold that the ultimate burden of proof is shifted by this presumption. Rather, we merely hold that this presumption creates a *prima facie* case that shifts the burden of production to the exporter to come forward with sufficient evidence to rebut this presumption. *See* Fed. R. Civ. P. 301. The totality of the evidence must then be weighed to determine whether a countervailable subsidy exists. Commerce, which retains the ultimate burden of persuasion, may prevail only if it establishes the existence of a countervailable subsidy by a preponderance of the evidence.

(2) *Allocation of Burdens in This Case*

It is uncontroverted that, by way of the IPRS program, the government of India provided Appellants with pig iron, a product for use in the production of exported goods, on terms and conditions more favorable than those available to manufacturers who produced iron castings for domestic consumption. This creates a presumption that the pig iron was provided on terms and conditions which were also more favorable than those commercially available on world markets. The burden of production thus shifted to Appellants to come forward with sufficient evidence to establish that such favorability did not exist. Appellants met this burden in so far as they relied on the information that the Indian government provided in its August 26, 1987 questionnaire response discussed previously.

The Indian government explained in this questionnaire response, and Appellants' have admitted in these proceedings, that it was not aware of any published, international reference price for pig iron when the 1985 IPRS rebates were given. Because it knew of no such published international price, the Indian government did the next best thing — it looked to actual market experience. The record establishes that the Indian government based the $ 126 per ton international benchmark price used from January to October of 1985 on a 1983 SAIL contract and the $ 113 per ton international benchmark price used from November to December of 1985 on a price quotation in a tender floated by MMTC in 1985. An article in *The Mining Journal, Ltd.; Mining Annual Review* (June, 1985) corroborates the substantial accuracy of the international bench-

mark prices used by the Indian government for the 1985 time period, in that it states that, as of 1984, "Australians were looking for a pig iron price substantially above the prevailing world level of around $ US120/t." *Mining Journal* at 86.

The foregoing sufficiently rebutted the presumption of countervailability attached to the IPRS program, and thus the burden of production shifted back to Commerce to come forward with proof that this evidence was neither accurate nor sufficient to establish that the IPRS rebates paid to exporters did not exceed the difference between the domestic price of pig iron and the price at which it could have been purchased internationally. Commerce failed to meet this burden.

In its final remand determination, Commerce did nothing more than allege that the Indian government's method of establishing international benchmark prices for calculating the 1985 IPRS rebates was inaccurate. Indeed, Commerce failed to set forth any evidence at all that these international benchmark prices were in fact inaccurate. The record before us clearly indicates that Commerce made no attempt whatsoever to determine *any* price at which pig iron could be purchased on world markets during the relevant time period.[8]

In this appeal, Appellees suggest that the Indian government's international benchmark prices were inherently inaccurate, as they were allegedly based on outdated and inconclusive sources, and therefore Commerce did not need to come forward with any evidence of their inaccuracy. Specifically, Appellees argue that there was no reasonable basis for the Indian government to believe that the price of pig iron had not changed since the 1983 SAIL contract, that the single price quoted in the tender floated by MMTC in 1985 did not alone establish what the world market price was in 1985, and that the reporting of "a" price for pig iron in the *Mining Journal* does not establish that this was the prevailing world market price.

We are unconvinced by these arguments. Viewed in combination, the 1983 SAIL contract price, the 1985 MMTC price quote, and the *Mining Journal* article represent more than a bare allegation of terms and conditions on world markets, and they support the substantial accuracy of the Indian government's international benchmark prices. Nothing in the record casts doubt on the validity of these prices or suggests that these prices were not in accord with prices in markets outside India.[9]

Commerce's misunderstanding of its burden of coming forward with evidence that the Indian government's international benchmark prices were in fact inaccurate was a procedural error that went to the heart of its administrative determination justifying reversal. In addition, be-

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[8]Given that Commerce had sufficient resources to send a team to India to ensure that the Indian government did indeed base its 1985 IPRS rebates on the $ 126 and $ 113 benchmark prices indicated in its questionnaire response, any arguments that Commerce did not have the necessary resources to determine whether pig iron could be purchased on international markets in 1985 at any price substantially different from that relied upon by the Indian government seem disingenuous at best.

[9]Moreover, to the extent that the price of pig iron on world markets had changed since the 1983 SAIL contract, the 1985 MMTC price quote evidences that the price had gone down, and thus the Indian government's international benchmark price of $ 126 in fact represented a conservative estimate which kept IPRS rebates lower than allowed.

cause there is no evidence of record indicating that the international benchmark prices used by the Indian government to calculate the 1985 IPRS rebates were inaccurate, Commerce's ruling that the 1985 IPRS rebates resulted in India providing its exporters with pig iron on terms or conditions more favorable than those commercially available on world markets was not based on substantial evidence. The CIT thus erred as a matter of law when it failed to reverse Commerce's final remand determination. For the foregoing reasons, reversal and remand is necessary so that Commerce may carry out a countervailing duty investigation pursuant to a proper allocation of burdens of proof and production.

B. *Inherent Procedural Unfairness*

The foregoing having been said, we are compelled to address in addition the inherent unfairness as to the manner in which Commerce handled its Item (d) investigation in this case.

During the course of Commerce's investigation leading up to its first determination, Commerce considered Item (d) to be "irrelevant" and thus never suggested to the Indian government or Appellants the need to establish a "world market price" for pig iron in 1985. City Pipe contends in its Reply Brief, and Appellees do not contest, that all information requested by Commerce during its investigation leading up to the first determination was produced. Commerce also never suggested that the Indian government or Appellants needed to provide any further information as to the 1985 international price of pig iron during the course of its investigation following remand by the CIT. On the contrary, Commerce's draft remand determination indicated that it had all of the information that it required to determine whether a countervailable subsidy existed.

Commerce is presumably in the best position to know what it means by its own requirements and what evidence will satisfy these requirements, and therefore, given the unique circumstances of this case, Commerce at a minimum bore a burden of requesting any additional information that it required when it came to its conclusion during the course of its remand determination, contrary to earlier indications, that the information of record was insufficient. It was inherently unfair for Commerce to take an affirmative position during the course of its initial investigation that "world market price" information was "irrelevant" and then, when the time had long passed for submitting such information, to declare the missing information so relevant that it could not render a determination in its absence. In this same vein, it also was unfair for Commerce to take an affirmative position during its remand investigation that it had all of the information that it needed and then declare in its final determination that the evidence was deficient without giving the Indian government or Appellants an opportunity to supplement the record. Appellant Crescent appropriately summarized the unfairness at page 8 of its reply brief when it stated: "India somehow had the burden to prove the 'international price' to the satisfaction of [Com-

merce], even though what [Commerce] required of India was never known or communicated to India and was never even an issue at the administrative level."

CONCLUSION

For the foregoing reasons, we hold that Commerce's ruling is neither supported by substantial evidence on the record nor in accordance with law. Accordingly, to allow Commerce to correct the errors discussed above, the August 28, 1992 judgment of the CIT is reversed, and the case is remanded for action consistent with this opinion.

REVERSED AND REMANDED

AD HOC COMMITTEE OF AZ-NM-TX-FL PRODUCERS OF GRAY PORTLAND CEMENT, PLAINTIFF-APPELLANT *v.* UNITED STATES, DEFENDANT-APPELLEE, CEMEX, S.A., DEFENDANT-APPELLEE, AND APASCO, S.A. DE C.V., DEFENDANT-APPELLEE

Appeal No. 93–1239

(Decided January 5, 1994)

Martin M. McNerney, Kilpatrick & Cody, of New York, New York, argued for plaintiff-appellant. With him on the brief were *Joseph W. Dorn* and *Michael P. Mabile*.

A. David Lafer, Senior Trial Counsel, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for defendant-appellee, The United States. With him on the brief were *Stuart E. Schiffer*, Acting Assistant Attorney General and *David M. Cohen*, Director. Also on the brief were *Stephen J. Powell*, Chief Counsel for Import Administration, *Berniece A. Browne*, Senior Counsel for Antidumping Litigation and *Terrence J. McCartin*, Attorney-Advisor, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

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Irwin P. Altschuler, *David R. Amerine* and *Ronald M. Wisla*, Manatt, Phelps & Phillips, of Washington, D.C., represented defendant-appellee, Cemex, S.A.

Appealed from: U.S. Court of International Trade.
Judge RESTANI.

Before MAYER and LOURIE, *Circuit Judges*, and LAY, *Senior Circuit Judge*.*

LAY, *Senior Circuit Judge*.

This is an appeal from a decision of the Court of International Trade brought by the Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray

*Honorable Donald P. Lay, Senior Circuit Judge, United States Court of Appeals for the Eighth Circuit, sitting by designation.

Portland Cement.[1] The Ad Hoc Committee filed an antidumping petition that resulted in investigations of imports of cement and cement clinker from Mexico. The Committee alleged that imports of gray portland cement and cement clinker from Mexico were being, or were likely to be, sold in the United States at less than fair value within the meaning of 19 U.S.C. § 1673 (1988). The Committee alleged that as a result of the unfair price, an industry in the United States was materially injured or threatened with material injury by reason of these imports. The International Trade Administration of the United States Department of Commerce (Commerce) compared the United States and home-market sales of three Mexican producers of cement, including defendant-intervenors Cemex, S.A., and Apasco, S.A. de C.V., as well as Cementos Hidalgo, S.C.L., and reached a final determination that Mexican cement and clinker were being, or were likely to be, sold in the United States at less than fair value. Gray Portland Cement and Clinker from Mexico, 55 Fed. Reg. 29,244 (Dep't Comm. 1990). The Antidumping Act provides that a foreign producer engages in dumping to the extent that the United States price (USP),[2] as calculated pursuant to 19 U.S.C. § 1677a, is less than the foreign market value (FMV)[3] of the same or similar merchandise, calculated pursuant to 19 U.S.C. § 1677b.[4] Following its determination that dumping had occurred, and a separate finding by the International Trade Commission that a United States industry was being materially injured by imports of gray portland cement and cement clinker from Mexico,[5] Commerce published an antidumping duty order reflecting its calculations of the manufacturers' margins of dumping. Gray Portland Cement and Clinker from Mexico, 55 Fed. Reg. 35,443 (Dep't Comm. 1990).

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[1]The Ad Hoc Committee is an association of United States producers of gray portland cement and clinker with production facilities in Arizona, New Mexico, Texas, and Florida.

[2]USP is initially measured as either the "purcase price" or "exporter's sales price" (ESP) of the merchandise, whichever is appropriate. 19 U.S.C. § 1677(a) (1988). "Purchase price" is the price at which a buyer in the United States agrees to purchase the merchandise from a reseller or from the foreign manufacturer. *Zenith Elecs. Corp. v. United States*, 988 F.2d 1573, 1577 (Fed. Cir. 1993); 19 U.S.C. § 1677a(b) (1988). This measure of USP is used where the U.S. importer is an unrelated, independent party. *Smith-Corona Group v. United States*, 713 F.2d 1568, 1572 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). "Exporter's sales price" is the price at which the foreign manufacturer or its agent sells or agrees to sell the merchandise in the United States. *Zenith*, 988 F.2d at 1577; 19 U.S.C. § 1677a(c) (1988). It is used where the importer is related to the foreign manufacturer, such that an arm's length transaction does not occur until the goods are resold to a retailer or to the public. *Smith-Corona*, 713 F.2d at 1572. In this case, Commerce used the purchase price approach. Once the initial USP figure is established, the statute then specifically requires Commerce to deduct, in the dection relevant to this appeal, any amount "attributable to any additional costs, charges, and expenses, and United States import duties, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States." 19 U.S.C. § 1677a(d)(2)(A) (1988).

[3]Commerce measure FMV as the foreign manufacaturer's sales price in the "ordinary course of trade" in its own country, for goods identical or simialr to the goods exported to the United States. 19 U.S.C. § 1677(b)(1)(A) (1988). Where reliable information regarding a foreign manufacturer's home country sales is lacking, Commerce may base FMV on the price of merchandise offfered for export sale to countries other than the United States, 19 U.S.C. § 1677b(a)(1)(B) (1988), or on a "constructed value," 19 U.S.C. § 1677b(a)(2) (1988); *Zenith*, 988 F.2d at 1577. In this case, Commerce based FMV on the foreign maufacturers' home-market sales. Like USP, FMV is to be adjusted to account for various factors. *See* 19 U.S.C. § 1677b(a)(1), (4) (1988). Unlike the USP provision, however, the FMV provision does not list shipping costs among the amounts to be deducted.

[4]19 U.S.C. § 1673 (1988) requires Commerce to assess antidumping duties on imported merchandise "in an amount equal to the amount by which the foreign market value exceeds the United States price for the merchandise." Thus, the higher the FMV and the lower the USP, the greater the margin of dumping and the greater the antidumping duty that will be imposed. *See Zenith*, 988 F.2d at 1576.

[5]Gray Portland Cement and Cement Clinker from Mexico, USITC Pub. 2305, Inv. No. 731–TA–451 (Aug. 1990) (final determination), *aff'd sub nom. Cemex, S.A. v. United States*, 790 F. Supp. 290 (Ct. Int'l Trade 1992), *aff'd*, 989 F.2d 1202 (Fed. Cir. 1993) (TABLE).

The Ad Hoc Committee challenged Commerce's calculations of the dumping margins in the Court of International Trade. *Ad Hoc Committee of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, 787 F. Supp. 208 (Ct. Int'l Trade 1992). The court[6] upheld Commerce's deduction from foreign market value of the costs of transporting cement from the manufacturing plants to storage facilities in Mexico prior to its sale to home-market (Mexican) customers. *Id.* We reverse and remand.

II

The sole issue on appeal is whether the foreign market value provision of the antidumping statute, 19 U.S.C. § 1677b, authorizes a deduction from foreign market value of pre-sale transportation costs within the exporting country for goods sold within that country. The parties agree that although the Act requires Commerce to deduct transportation costs from USP, there is no specific statutory authorization for Commerce to deduct home-market transportation expenses from its calculations of FMV. In the past, Commerce determined whether to deduct home-market transportation costs by looking to the "circumstances of sale" provision of 19 U.S.C. § 1677b(a)(4) (1988).[7] This provision and its accompanying regulations, *see* 19 C.F.R. § 353.56(a)(1) (1993), require a direct relationship between an expense and the sale at issue. Commerce's longstanding general practice, therefore, was to deduct from foreign market value only those transportation costs incurred *after* the date of sale, when the direct relationship was established. *See, e.g.*, Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 54 Fed. Reg. 18,992, 19,049 (Comment 33) (Dep't Comm. 1989) (final determination); Television Receivers, Monochrome and Color, from Japan, 53 Fed. Reg. 4050, 4052 (Comment 18) (Dep't Comm. 1988) (final results); Color Television Receivers from Korea, 53 Fed. Reg. 24,975, 24,988 (Comment 72) (Dep't Comm. 1988) (final results); Kraft Condenser Paper from Finland, 47 Fed. Reg. 3813 (Dep't Comm. 1982) (final results). Pre-sale transportation expenses were treated as "indirect expenses," deductible from FMV only when ESP was used as the basis for the United States price. *See* 19 C.F.R. § 353.41(e)(2) (1993). In the case at bar, however, Commerce altered this practice and deducted pre-sale inland freight expenses while conducting a purchase price, rather than the exporter's sale price, comparison. In the present case, Commerce does not rely on the circumstances of sale provision, but on its inherent power as the ad-

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[6] The Honorable Jane A. Restani, United States Court of International Trade.

[7] This provision states:

> In determining foreign market value, if it is established to the satisfaction of the administering authority that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to—
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> * * * * * * *
>
> (B) other differences in circumstances of sale; * * *
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> * * * * * * *
>
> then due allowance shall be made therefor.

19 U.S.C. § 1677b(a)(4) (1988).

ministering authority to fill "gaps" in the statutory framework in reasonable ways consistent with the objectives of the antidumping law.[8]

Commerce argues, and the Court of International Trade agreed, that it has the discretion to deduct home-market transportation costs from foreign market value because the statute is silent and doing so furthers its primary goal when calculating FMVs and USPs of comparing "apples with apples," i.e., comparing prices of merchandise in the United States with those in the foreign market at a similar point in the chain of commerce. *Ad Hoc Comm.*, 787 F. Supp. at 212–13 (citing *Smith-Corona*, 713 F.2d at 1578). The deduction from FMV, when combined with the statutorily mandated deduction from USP, means that on both sides, ex-factory prices will be the basis for comparison. *Id.* Without the deduction from FMV, the comparison is apples to oranges: ex-factory price in the United States but the *ex-warehouse* price in the foreign market.

The Ad Hoc Committee disputes the initial premise that the statute is silent. In its view, the fact that the deduction is included in the provisions for USP but not for FMV means that Congress did not intend for home-market transportation costs to be deducted.

III

It is well established that where Congress has included specific language in one section of a statute but has omitted it from another, related section of the same Act, it is generally presumed that Congress intended the omission. *Russello v. United States*, 464 U.S. 16, 23 (1983) (citing *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)); *see also United States v. Azeem*, 946 F.2d 13, 17 (2d Cir. 1991); *United States v. Espinoza-Leon*, 873 F.2d 743, 746 (4th Cir.), *cert. denied*, 492 U.S. 924 (1989); *Arizona Elec. Power Cooperative, Inc. v. United States*, 816 F.2d 1366, 1375 (9th Cir. 1987). Absent strong evidence to the contrary, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992).

The applicability of this principle was made clear in *Zenith Electronics Corp. v. United States*, 988 F.2d 1573 (Fed. Cir. 1993), where we held that Commerce erred when it adjusted both the USP and the FMV to account for Japanese commodity taxes that were collected on merchandise sold in Japan, but not collected on merchandise exported to the United States. We noted that 19 U.S.C. § 1677a(d)(1)(C) (1988) explicitly requires Commerce to increase USP by the amount of taxes that the exporting country would have assessed on the merchandise if it had been sold in the home market. *Zenith*, 988 F.2d at 1580. Commerce applied the circumstances of sale provision to adjust FMV in an effort to achieve tax neutrality in its comparisons, reasoning that adjusting USP to account for the forgiven commodity tax would cause an increase

[8] Although intervenors urge that we affirm the Court of International Trade judgment under the "circumstances of sale" provision, we decline the invitation. It is well settled that an agency's action may not be upheld on grounds other than those relied on by the agency. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

in the dumping margin not directly related to less-than-fair-value sales. *Id.* at 1578. We rejected this approach, concluding that "[t]he Act is not silent about the disparity created between FMV and USP when a foreign government forgives commodity taxes on exports. Section 1677a(d)(1)(C) expressly directs Commerce to adjust USP. In the face of an unambiguous statutory directive, Commerce may only effect tax adjustments under that section." *Id.* at 1582.

In the circumstances of this case, we believe that had Congress intended to deduct home-market transportation costs from FMV, it would have made that intent clear. FMV and USP are intimately related concepts, given full meaning only by their relationship to one another. The Antidumping Act revolves around the difference between the two. *See* 19 C.F.R. § 353.2(f)(1) (1993) (defining dumping margin with reference to USP and FMV). In slightly different forms, the USP provision, 19 U.S.C. § 1677a, and the FMV provision, 19 U.S.C. § 1677b, were passed together as part of the original Antidumping Act, 1921, ch. 14, 42 Stat. 11 (1921). From the Act's beginning, therefore, it is likely Congress has considered one only with reference to the other and has been well aware of any differences between them. That Congress included a deduction for transportation costs from USP but not from FMV leads us to conclude that Congress did not intend pre-sale home-market transportation costs to be deducted from FMV.[9]

IV

In reaching its decision, the Court of International Trade upheld Commerce's interpretation of § 1677b in part because it was "loath to

---

[9] The language of the original Antidumping Act, 1921, ch. 14, 42 Stat. 11 (1921), provides strong support for this conclusion. In the original Act, mention of transportation costs is even more conspicuously absent from the FMV provision than it is today. The Act defines "purchase price," what has since 1980 been part of USP, as being the agreed upon price for the merchandise:

> plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition, packed ready for shipment to the United States, *less the anount, if any, included in such price, attributable to any additional costs, charges, and expenses, and United States import dutes, incident to bringing the merchandise from the place of shipment in the country of exportation to the place of delivery in the United States* * * *.

Id. § 203 (emphasis added). Foreign market value is defined in part with the *identical* language, but without any mention of shippping costs. *Id.* § 205. Thus, FMV is the ordinary home market price:

> plus, when not included in such price, the cost of all containers and coverings and all other costs, charges, and expenses incident to placing the merchandise in condition packed ready for shipment to the United States, except that in the case of merchandise purchase or areed to be purchased by the person by whom or for whose account the merchandise is imported, prior to the time of exportation, the foreign market value shall be ascertained as of the date of such pruchase or agreement to purchase.

Id. Even given the vagaries of the legislative drafting process, it is impossible to imagine that Congress unintentionally included the same phrasing in the two passages only up to the point where the deduction for transportation costs from USP was discussed. The omission of the transportation cost deduction from FMV seems fullly intended.

Since passage of the original Act, the antidumping laws have been amended and the continuity of the identical phrasing has been eliminated, but the substance of today's USP and FMV statutes remains unchanged. Indeed, despite two significant amendments to the antidumping laws in the past ten years—in the Trade and Tariff Act of 1984, Pub. L. No. 98–573, 98 Stat. 2948 (1984), and in the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, 102 Stat. 1107 (1988)—Congress has not altered the Act's treatment of home market transportaiton costs. Congress has not done so, even though it was advised by Commerce in its 1985 "Study of Antidumping Adjustments Methodology and Recommendations for Statutory Change" that Commerce believed it lacked statutory authorization to deduct home market transportation costs from FMV. That Congress knew of the agency's prior interpretation of the Act and, despite twice amending other Act provisions, did nothing to change the interpretation or the statutory language on which it was based in persuasive evidence that the agency's prior interpretation was the one intended by Congress. *See Daewoo Elecs. Co. v. United States*, 6 F.3d 1511, 1522 (Fed. Cir. 1993); *Chaparral Steel Co. v. United States*, 901 F.2d 1097, 1105–06 (Fed. Cir. 1990) (quoting *NLRB v. Bell Aerospace*, 416 U.S. 267, 275 (1974)). In such circumstances, we cannot attribute the difference between the statute's treatment of transportation costs under the USP and FMV provisions to Congressional inadvertence or inattention.

tell ITA it cannot be more fair than it has been in the past when the statute would seem to allow it some room to make the fairer choice." 787 F. Supp. at 213. Thus, the court urged that deducting pre-sale home transportation costs from FMV "engenders a more accurate and meaningful comparison," *id.*, and better serves Commerce's "primary goal" of comparing "apples with apples," *id.* at 212 (citing *Smith-Corona,* 713 F.2d at 1578). Under *Chevron*[10] and its progeny, however, courts do not consider the reasonableness of an agency's interpretation of a statute unless the relevant statute is silent or ambiguous on the question at hand. *See Glaxo Operations UK Ltd. v. Quigg,* 894 F.2d 392, 398 (Fed. Cir. 1990). The general prescriptions of *Smith-Corona,* which serve to guide Commerce in making reasonable interpretations of the Antidumping Act, do not apply where the Act itself clearly expresses the intent of Congress. *Zenith,* 988 F.2d at 1582. Because we believe the antidumping statute is not silent on the question of pre-sale home-market transportation cost deductions from FMV, therefore, the reasonableness or fairness of Commerce's interpretation of the Antidumping Act is irrelevant.

Even if the statute's "primary goal" may seem to be ill-served by not allowing the deduction from FMV, that conclusion does not justify reading into the statute agency discretion that clearly is not there. As the Supreme Court stated in *Rodriguez v. United States,* 480 U.S. 522 (1987) (per curiam):

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Id. at 525–26. Congress acts through bargaining and compromise; legislation frequently includes provisions that are not entirely consistent with the general statutory purpose. In *Glaxo Operations UK Limited v. Quigg,* 894 F.2d 392 (Fed. Cir. 1990), we rejected a claim that the Commissioner of Patents and Trademarks' interpretation of 35 U.S.C. § 156 was more consistent with the general purpose of the Act of which it was a part than the plain statutory language. We concluded:

> We simply cannot say that the plain meaning of section 156 would provide unwanted results because Congress may very well have contemplated all the ramifications of its chosen definition in light of the political realities as seen played out in the legislative process, and we must assume it did.

Glaxo, 894 F.2d at 397. We make a similar assumption here. Congress may have wanted the differential for any of a number or reasons, the most evident of which being to increase the likelihood and size of dumping margins found by Commerce. Whatever the reason, it is not this

[10] *Cheveron USA v. Natural Resources Defense Council,* 467 U.S. 837 (1984).

court's role to substitute its view of the statute's purpose for the plain language, or conspicuous lack thereof, in the statute.

Finally, we note that the results of giving effect to the language of the statute by denying the deduction of home-market transportation costs from FMV are not so "absurd" as to justify departure under such cases as *Ambassador Division of Florsheim Shoe v. United States*, 748 F.2d 1560 (Fed. Cir. 1984) and *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892). In *Ambassador*, we held that applying the plain statutory language of two tariff provisions, passed together in *pari materia*, would result in one provision frustrating or partially repealing the other. *Id.* at 1565. No such conflict occurs here. Deduction of transportation costs from USP but not FMV creates a *different* comparison than would obtain if the costs were deducted from FMV as well, but neither provision frustrates the operation of the other. As indicated by the fact that Commerce applied the deduction to USP alone for more than a decade without disastrous consequences, the plain language does not lead to absurd results.

V

For the foregoing reasons, the judgment of the Court of International Trade with respect to Commerce's deduction of pre-sale home-market transportation costs from FMV is reversed. The case is remanded with direction that Commerce recalculate the dumping margins involved in this case without such deductions.

Costs award to plaintiff-appellant.

REVERSED AND REMANDED

United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

Chief Judge

Dominick L. DiCarlo

Judges

Gregory W. Carman
Jane A. Restani
Thomas J. Aquilino, Jr.
Nicholas Tsoucalas
R. Kenton Musgrave
Richard W. Goldberg

Senior Judges

James L. Watson

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Clerk

Joseph E. Lombardi

Decisions of the United States Court of International Trade

(Slip Op. 94–32)

MAKITA CORP., MAKITA U.S.A., INC., AND MAKITA CORP. OF AMERICA, PLAINTIFFS *v.* UNITED STATES AND U.S. DEPARTMENT OF COMMERCE (INTERNATIONAL TRADE ADMINISTRATION), DEFENDANTS, AND BLACK & DECKER (U.S.) INC., INTERVENOR-DEFENDANT

Court No. 93–08–00450

MAKITA CORP., MAKITA U.S.A., INC. AND MAKITA CORP. OF AMERICA, PLAINTIFFS *v.* UNITED STATES AND U.S. INTERNATIONAL TRADE COMMISSION, DEFENDANTS, AND BLACK & DECKER (U.S.) INC., INTERVENOR-DEFENDANT

Court No. 93–08–00451

[Plaintiffs' motions to supplement the agency records and for leave to file requests for admissions denied.]

(Dated February 25, 1994)

Verner, Liipfert, Bernhard, McPherson and Hand, Chartered (William A. Zeitler) for the plaintiffs.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Patricia L. Petty);* and Office of the Chief Counsel for Import Administration, U.S. Department of Commerce *(Linda Andros),* of counsel; for defendants United States and Department of Commerce.

Office of the General Counsel, U.S. International Trade Commission *(Lyn M. Schlitt, James A. Toupin* and *Robin L. Turner)* for defendant United States International Trade Commission.

Stroock & Stroock & Lavan (James Taylor, Jr.) for the intervenor-defendant.

MEMORANDUM AND ORDER

AQUILINO, *Judge:* Having commenced above-encaptioned action 93–08–00450 to reverse and/or vacate the *Final Determinations of Sales at Less Than Fair Value: Professional Electric Cutting Tools and Professional Electric Sanding/Grinding Tools From Japan,* published by the International Trade Administration, U.S. Department of Commerce ("ITA") at 58 Fed.Reg. 30,144 (May 26, 1993), as amended, *Antidumping Duty Order and Amended Final Determination: Professional Electric Cutting Tools From Japan,* 58 Fed. Reg. 37,461 (July 12, 1993), and above-encaptioned action 93–08–00451 to reverse and/or vacate the affirmative determination of material injury published by the U.S. In-

ternational Trade Commission ("ITC") *sub nom. Professional Electric Cutting and Sanding/Grinding Tools From Japan,* 58 Fed.Reg. 37,967 (July 14, 1993), the plaintiffs now interpose motions to supplement the underlying administrative record filed with the court in each action as well as for leave to serve and file requests for admissions as to the contents of those records.

I

In regard to the ITA's record, plaintiffs' motion seeks an order that

> Makita's March 11, 1993 submission to the Department of Commerce, which includes 300 affidavits, be added to the administrative record sent by the Department to the Court. This submission was presented to the Department during the course of the investigation and contains highly relevent information relating to the lack of basis for the Department's definition of "professional" electric cutting tools. It is not presently included in the record before the Court.

The government admits that the referenced submission is not included in the record but points to 19 C.F.R. § 353.31(a), which provides, in part:

> (3) The Secretary will not consider in the final determination or the final results, or retain in the record of the proceeding, any factual information submitted after the applicable time limit. The Secretary will return such information to the submitter with written notice stating the reasons for return of the information.

The defendants also produce copies of correspondence which indicate that the respondents Makita requested postponement of the deadlines for submission of additional comments on the scope of the investigation and for submission of a questionnaire[1]; that those request(s) were granted—to February 16 and 23, 1993, respectively[2]; and that, notwithstanding the extensions, the submission at issue was not attempted, as indicated above, until March 11, 1993. Whereupon that attempt was rejected by the ITA.[3]

The foregoing facts, in the face of the agency regulation quoted above, leave the plaintiffs in no better position before this court than before the ITA. *Cf. Asociacion Colombiana de Exportadores de Flores v. United States,* 13 CIT 13, 24–25, 704 F.Supp. 1114, 1124 (1989), *aff'd,* 901 F.2d 1089 (Fed.Cir.), *cert. denied,* 498 U.S. 848 (1990). With regard to the ITC, the gravamen of plaintiffs' motion to supplement that agency's record is that a March 26, 1993 Makita submission is not included in the matter on file in action 93–08–00451. However, the Commission Secretary has certified to the court that the record it has filed is "true and complete", and perusal of the lists appended to her certificate leads to material

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[1] Defendants' Opposition to Plaintiffs' Motion to Supplement the Administrative Record in action 93–08–00450, Attachment A.

[2] *See id.,* Attachment B.

[3] *See id.,* Attachment C.

characterized as "Makita Marketing Info."[4], the object of the motion to supplement. In fact, the plaintiffs have since formally filed a notice of withdrawal of their superfluous imposition.

II

Equally problematic are plaintiffs' motions for leave to serve and file requests for admissions. CIT Rule 36 contemplates such requests but not in actions like these brought pursuant to 19 U.S.C. § 1516a and 28 U.S.C. § 1581(c), save "rare or exceptional" circumstances not apparent here. *Cf. Mitsuboshi Belting Limited v. United States,* 18 CIT ___, Slip Op. 94–23 (Feb. 10, 1994), and cases cited therein. For actions described in 28 U.S.C. § 1581(c), this Court of International Trade has adopted a Rule 56.2, which provides in part:

(a) *Proposed Briefing Schedule and Joint Status Report.*

* * * * * * *

> No later than 30 days after the filing of the record with the court, the parties * * * shall file with the clerk (1) a Joint Status Report, and (2) a proposed briefing schedule. The Joint Status Report shall be signed by counsel for all parties and shall set forth answers to the following questions, although separate views may be set forth on any point on which the parties cannot agree:
>
> 1. Does the court have jurisdiction over the action?
> 2. Should the case be consolidated with any other case, or should any portion of the case be severed, and the reasons therefor?
> 3. Should further proceedings in this case be deferred pending consideration of another case before the court or any other tribunal and the reasons therefor?
> 4. Are there any outstanding issues concerning the issuance of a judicial protective order?
> 5. Is there any other information of which the court should be aware at this time?
>
> The proposed briefing schedule shall indicate whether the parties (1) agree to the time periods set forth in Rule 56.2(d), (2) agree to time periods other than the time periods set forth in Rule 56.2(d), or (3) cannot agree upon a time period. In the event the parties cannot agree on a time period, the parties shall indicate the areas of disagreement and shall set forth the reasons for their respective positions.
>
> After the Joint Status Report and proposed briefing schedule are filed, the judge promptly shall enter a scheduling order.

In accordance with this rule, the parties have filed the requisite report in each of these actions. In regard to question 5 *supra,* each apprises the court of disagreement among the signatories. To quote from the submission in action 93–08–00450:

> A. *Stipulations Concerning The Administrative Record:*
>
> *Plaintiffs* have sought and will continue to seek to enter stipulations with the Defendant concerning the content of the administra-

[4]ITC Administrative Record List No. 2, Document 20.E.

> tive record on the issue of the product definition. Plaintiffs submit that these stipulations are in the interest of efficiency and will assist the parties and the Court in narrowing the issues to be decided.
>
> To the extent stipulations are not entered into, Plaintiffs may file an appropriate motion to have the product definition issue resolved by the Court on the basis of undisputed facts in the record prior to the briefing of the remaining issues.
>
> * * * * * * *
>
> D. *Agreement to Remand:*
>
> Plaintiffs believe that an agreement to remand is appropriate in this case because the existing antidumping order is overly broad. Consequently, the antidumping order is inimical to competition. Plaintiffs have offered to agree to a remand and to accept an order based on one of Plaintiffs' alternative definitions of "professional" tools.

The report filed in the other action contains similar proposals concerning the content of the record and a proposed remand, among other concepts. Both reports indicate opposition to them by the defendants and the intervenor-defendant. Whereupon those opponents are proposed targets of the requests for admissions. In each motion therefor, the plaintiffs disclaim "seeking discovery." Rather, they claim to desire "admissions from the defendant with respect to what is or is not in the administrative record." Review of the 23 requests proposed for action 93–08–00450 and of the 26 for No. 93–08–00451 tends to support this claim, but this support cannot result in leave to even formally serve them.

The reason is simple: While the questions posed may be for the parties to debate, they are for the court to answer. That is, in actions such as these, the court must decide whether or not the records compiled by the ITA and ITC reflect proceedings before them in accordance with law and substantial evidence in support of their determinations complained of. *See* 19 U.S.C. § 1516a(b)(1)(B). If those records are found lacking on either count, a complainant is entitled to relief.

III

Clearly, plaintiffs' foregoing motions have not advanced the moment of that judicial reckoning. From all the papers the parties have already brought forth, pro[5] and against, however, the court cannot find that the underlying intent has been obstruction. Perhaps CIT Rule 56.2, which is still of recent adoption, is the source of the confusion. If it is, let the Bar beware that the rule is not an invitation to the kind of practices described above. Necessarily, they will lead to denial of concomitant motions, if not additional sanction.

In hereby denying each of plaintiffs' aforesaid motions, the court also admonishes the parties to comply with the dictates of Rule 56.2(d) as of the date hereof.

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[5]The plaintiffs have interposed motions for leave to file reply briefs in support of their requests in both actions. Those supplemental motions are hereby denied. *Cf.* CIT Rule 7(d).

(Slip Op. 94–33)

TOYOTA MOTOR SALES, INC. PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND HYSTER CO., A.K.A., NACCO MATERIALS HANDLING GROUP, INC.,[1] ET AL., DEFENDANT-INTERVENOR

Consolidated Court No. 92–03–00134

(Dated March 1, 1994)

JUDGMENT

ORDER

CARMAN, *Judge:* This case having been duly submitted for decision and this Court, after due deliberation, having rendered a decision herein; now, in conformity with said decision, it is hereby

ORDERED that Commerce's remand determination in *Final Results of Redetermination Pursuant to Court Remand, Toyota Motor Sales, USA, Inc. and Toyo Umpanki Co., Ltd. v. United States, Court No. 92–03–00134, Court Order (July 23 1993)* (1993) is sustained; and it is further

ORDERED that this action is dismissed.

SCHEDULE OF CONSOLIDATED CASES

Toyo Umpanki Co., Ltd. v. United States, Court No. 92–03–00135.

(Slip Op. 94–34)

HYSTER CO., A.K.A., NACCO MATERIALS HANDLING GROUP INC., INDEPENDENT LIFT TRUCK BUILDERS UNION, INTERNATIONAL ASSOC. OF MACHINISTS AND AEROSPACE WORKERS, INTERNATIONAL UNION, ALLIED INDUSTRIAL WORKERS OF AMERICA (AFL-CIO), AND UNITED SHOP AND SERVICE EMPLOYEES, PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND NISSAN MOTOR CO., LTD., ET AL., TOYOTA MOTOR SALES, U.S.A., INC., AND TOYO UMPANKI CO., LTD., DEFENDANT-INTERVENORS

Court No. 92–03–00133

The Department of Commerce's final results in *Certain Internal-Combustion, Industrial Forklift Trucks from Japan; Final Results of Antidumping Duty Administrative Review,* 57 Fed. Reg. 3167 (1992) are sustained in part and remanded in part.

The Court holds Commerce properly (1) determined it is not required to conduct a test of consumer tax incidence; (2) determined the Japanese consumption tax was included in the price of defendant-intervenors' forklift trucks; (3) selected a model match meth-

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[1]Subsequent to remand, defendant-intervenor changed its name from Hyster Co. to NACCO Materials Handling Group, Inc.

odology; (4) determined Toyo's purchases from suppliers were at arm's length; (4) accepted Nissan's accounting methodology pertaining to Nissan's U.S. value-added costs; (5) treated Toyota's fringe benefits; (6) determined verification of Nissan's and Toyo's cost of production was unnecessary; (7) treated Nissan's home market rebates; and (8) accounted for Toyota's value-added labor costs and product liability premiums.

On remand Commerce is directed to: (1) eliminate the use of 19 U.S.C. § 1677b(a)(4)(B) in accounting for the "multiplier effect," and consider any further adjustments to USP consistent with *Zenith* and title 19 which it deems appropriate; (2) point, if it is able, to substantial evidence on the record in support of its determinations that Nissan's and Toyota's related party transfer prices were arm's length, and if it is unable to point to such evidence, to make any necessary adjustments; and (3) correct the errors in Toyo's data base.

(Dated March 1, 1994)

Collier, Shannon, Rill & Scott (Paul C. Rosenthal, Mary T. Staley and David C. Smith, Jr.), for plaintiffs.

Frank W. Hunger, Assistant Attorney General, *David Cohen,* Director, Civil Division, Commercial Litigation Branch, U.S. Department of Justice *(Jeffrey M. Telep), Patrick Gallagher,* Attorney-Advisor, Office of the Deputy Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for defendant.

Arnold & Porter (Lawrence A. Schneider and *Susan T. Morita),* for defendant-intervenors Nissan Motor Co. *et al.*

Dorsey & Whitney (John B. Rehm, Munford Page Hall, II and *L. Daniel Mullaney),* for defendant-intervenor Toyota Motor Sales, U.S.A., Inc.

O'Melveny & Myers (Greyson Bryan, Craig L. McKee and *Bruce Hirsh),* for defendant-intervenor Toyo Umpanki Co., Ltd.

OPINION

CARMAN, *Judge:* Plaintiffs move for judgment upon the agency record pursuant to Rule 56.1 of this Court. Plaintiffs contest the Department of Commerce's final results in *Certain Internal-Combustion, Industrial Forklift Trucks from Japan; Final Results of Antidumping Duty Administrative Review,* 57 Fed. Reg. 3167 (1992) *(Final Results).* The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (1988).

BACKGROUND

Plaintiffs (NACCO Materials Handling Group, Inc.,[1] Independent Lift Truck Builders Union, International Association of Machinists and Aerospace Workers, International Union, Allied Industrial Workers of America (AFL-CIO), and United Shop and Service Employees (collectively "NACCO")) are a U.S. manufacturer of internal-combustion, industrial forklift trucks, and domestic unions representing workers who are engaged in the manufacture of internal-combustion, industrial forklift trucks in the U.S. The three defendant-intervenors, Nissan,[2] Toyota, and Toyo, are manufacturers/exporters of the internal-combustion, industrial forklift trucks from Japan under review.

Commerce published an antidumping duty order covering certain internal-combustion forklift trucks from Japan on June 7, 1988, and a notice of an initiation of administrative review of the antidumping duty

[1] During the course of this litigation, plaintiff changed its name from Hyster Co. to NACCO Materials Handling Group, Inc.

[2] Defendant-Intervenors Nissan Motor Co., Ltd., Nissan Industrial Equipment Corp. and Barrett Industrial Trucks, Inc. will be referred to collectively as "Nissan."

order on July 25, 1989. *See Antidumping Duty Order and Amendment to Final Determination of Sales at Less Than Fair Value; Certain Industrial Internal-Combustion Forklift Trucks from Japan,* 53 Fed. Reg. 20,882 (1988); *Initiation of Antidumping and Countervailing Duty Administrative Reviews,* 54 Fed. Reg. 30,915 (1989). The review covered the period of November 24, 1987 through May 31, 1989. *Id.*

After comparing U.S. price (USP) to foreign market value (FMV), Commerce determined that the following margins existed for the review period: Toyota 12.22%,[3] Nissan 7.36%, and Toyo 7.71%.[4] *Final Results,* 57 Fed. Reg. at 3183–84. Commerce published the preliminary results of its review on May 23, 1991. *Certain Internal-Combustion, Industrial Forklift Trucks from Japan; Preliminary Results of Antidumping Duty Administrative Review,* 56 Fed. Reg. 23,675 (1991). Commerce published the final results of its administrative review on January 28, 1992. *Final Results,* 57 Fed. Reg. at 3167.

On August 6, 1993, this Court remanded the final results to Commerce with respect to Commerce's failure to account for Toyota's U.S. direct advertising expenses. *Hyster Co. v. United States* (Remand Order, Aug. 6, 1993). On remand, Commerce accounted for Toyota's U.S. direct advertising expenses, but despite the changes made in its analysis, Toyota's dumping margin did not change. *Id.* at 4.

Contentions of the Parties

NACCO argues the Court should grant a remand and order Commerce to (1) eliminate its original adjustment to USP and FMV to account for the Japanese consumption tax; (2) match U.S. sales with the most similar home market sales; (3) reject Nissan's, Toyota's and Toyo's transfer prices as a basis for cost; (4) recalculate Nissan's and Toyota's value-added expenses; (5) disallow an adjustment for rebates given by Nissan; (6) correct the errors in Toyo's database; and (7) recalculate Toyota's U.S. Labor and product liability expenses.[5]

Commerce contends its determination is based upon substantial evidence on the record and is otherwise in accordance with law except with respect to the circumstance of sale adjustment made for the Japanese consumption tax and its failure to correct errors in Toyo's database. Commerce argues the Court should remand the case directing it (1) to correct errors in Toyo's database and (2) to delete the circumstance of sale adjustment. Commerce requests the Court to affirm its final results in all other respects.

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[3]In a separate action before this Court, Toyo and Toyota contested certain aspects of Commerce's final determination. *Toyota Motor Sales, USA, Inc. v. United States,* Court No. 92–03–00134. The Court remanded *Toyota* and after the completion of the remand, Commerce determined Toyota's margin to be 12.02%. *See* 17 CIT ___, 829 F. Supp. 1364 (1993); *Final Results of Redetermination Pursuant to Court Remand, Toyota Motor Sales, USA, Inc. v. United States, Court No. 92–03–00134, Court Order (July 23, 1993)* at 4.

[4]Commerce also determined a margin of 39.15% existed for Mitsubishi Heavy Industries (MHI). MHI, however, is not a party to the instant action.

[5]Plaintiffs also argue in their briefs that Commerce's failure to account for Toyota's U.S. direct advertising expenses was not in accordance with law. This point, however, is no longer in issue because on August 6, 1993, the Court ordered a remand with respect to Toyota's U.S. direct advertising expenses and none of the parties contested Commerce's remand determination. *See Final Results of Redetermination Pursuant to Court Remand Hyster Co. v. United States* (1993).

Defendant-Intervenors maintain plaintiffs' arguments are without merit. Nissan, Toyota and Toyo argue the aspects of the final results plaintiffs challenge are supported by substantial evidence on the record and are otherwise in accordance with law.

STANDARD OF REVIEW

In an action challenging Commerce's final results, this Court must decide whether Commerce's determination is supported by substantial evidence on the record and is otherwise in accordance with law. 19 U.S.C. § 1516a(b)(1)(B) (1988). "Substantial evidence is something more than a 'mere scintilla,' and must be enough reasonably to support a conclusion." *Ceramica Regiomontana S.A. v. United States,* 10 CIT 399, 405, 636 F. Supp. 961, 966 (1986), *aff'd,* 5 Fed. Cir. (T) 77, 810 F.2d 1137 (1987) (citations omitted).

The Court must accord substantial weight to the agency's interpretation of the statute it administers. *American Lamb Co. v. United States,* 4 Fed. Cir. (T) 47, 54, 785 F.2d 994, 1001 (1986) (citations omitted). "An agency's 'interpretation of the statute need not be the *only* reasonable interpretation or the one which the court views as the most reasonable.'" *ICC Indus., Inc. v. United States,* 5 Fed. Cir. (T) 78, 85, 812 F.2d 694, 699 (1987) (emphasis in original) (citation omitted) *(ICC Indus.).*

DISCUSSION

A. *Japanese Consumption Tax:*

1. *Tax Pass Through:*

To prevent dumping margins from arising because the country of exportation assesses certain taxes on home market sales but not on export sales, the antidumping law provides for an offsetting adjustment in the calculation of United States price. The relevant statute provides as follows:

> **(d) Adjustments to purchase price and exporter's sales price.**—The purchase price and the exporter's sales price shall be adjusted by being—
>
> (1) increased by—
>
> * * * * * * *
>
> (C) the amount of any taxes imposed in the country of exportation directly upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States, but only to the extent that such taxes are added to or included in the price of such or similar merchandise when sold in the country of exportation * * *.

19 U.S.C. § 1677a(d)(1)(C) (1988).

Plaintiffs claim Commerce has violated 19 U.S.C. § 1677a(d)(1)(C) by assuming the Japanese consumption tax was completely passed through to consumers. Plaintiffs argue there is no evidence on the re-

cord supporting the conclusion the tax was completely passed through. Plaintiffs request the Court, therefore, to remand this issue to Commerce with directions to assume none of the tax was passed through to consumers and eliminate the adjustment made to USP.

Commerce argues 19 U.S.C. § 1677a(d)(1)(C) does not require it to measure the consumer tax incidence of the Japanese tax. Commerce claims Congress never intended it to conduct an econometric study of consumer tax incidence in every antidumping case involving refunded home market taxes. The burden on its time and resources would be enormous, according to Commerce, if it were required to conduct such econometric studies.

Defendant-Intervenors maintain a tax pass through analysis is unnecessary. Toyota and Nissan argue Commerce correctly accounted for the Japanese consumption tax in adjusting USP. They maintain evidence on the record demonstrates they passed the consumption tax through to their respective home market customers. Toyo argues a tax pass through analysis is not necessary because the forklift truck market is a competitive market. Toyo claims a consumption tax is passed entirely to consumers in a competitive market. Defendant-Intervenors claim, therefore, they are entitled to an upward adjustment to USP even if the Court accepts plaintiffs' reading of the law.

Subsequent to oral argument in this case, the Court of Appeals for the Federal Circuit (CAFC) issued an opinion dealing directly with the issue of whether 19 U.S.C. § 1677a(d)(1)(C) requires Commerce to measure consumer tax incidence. *Daewoo Elecs. Co. v. International Union*, 11 Fed. Cir. (T) ____, 6 F.3d 1511 (1993). The Court of International Trade (CIT) had held § 1677a(d)(1)(C) compelled Commerce to analyze the consumer tax incidence of the taxes. *Daewoo Elecs. Co. v. United States*, 13 CIT 253, 712 F. Supp. 931 (1989). Commerce appealed to the CAFC arguing the statute only required it to examine the "customary business records of exporters." *Daewoo*, 11 Fed. Cir. at ____, 6 F.3d at 1516. According to Commerce,

> [i]f an exporter's records show that a tax was either a separate "add on" to the domestic price, or although not separately stated, was, in fact, included in the price and that the taxes were paid to the government, that satisfies the tax inquiry required by the statute for an adjustment of the USP.

Id. at ____, 6 F.3d at 1516–17. Instead of being compelled to conduct an econometric study, Commerce maintained it need only employ an accounting approach. *Id.* at ____, 6 F.3d at 1514. The CAFC reversed the CIT on this issue holding Commerce's interpretation of the statute to be a reasonable one. *Id.* at ____, 6 F.3d at 1517.

Based on the CAFC's decision in *Daewoo*, this Court holds Commerce is not required to conduct a test of consumer tax incidence. Plaintiffs' argument that the Court must order Commerce to assume no consumer tax incidence fails. The issue remains, however, whether Commerce has satisfied the standard set out by the CAFC: did Commerce examine the

exporters' records and based on substantial evidence on the administrative record determine the Japanese consumption tax was included in the price.

Evidence on the record demonstrates Commerce verified through defendant-intervenors' business records the fact the defendant-intervenors included the three percent Japanese consumption tax in the price of the merchandise sold in the home market. Commerce examined in detail documentation supporting eleven Toyota home market sales. AR 17 at 238A. Among the documentation examined were Toyota's financials which indicated the three percent Japanese consumption tax was included in the listed transactions. AR 24 at 139A. Similarly, Commerce's examination of Nissan's financials indicated Nissan included the consumption tax in the price. AR 38 at 15. Commerce also examined a sample sale of Toyo's and concluded the company included the three percent consumption tax in the total price of the truck. AR 134 at 260A. Based on the substantial evidence on the record, the Court holds Commerce has satisfied the standard established by the CAFC. Plaintiffs' motion, therefore, fails with respect to this issue.

2. *Multiplier Effect:*

In its investigation, Commerce calculated the amount of commodity tax not collected on the export sales and added it to USP. Commerce then made a circumstance of sale adjustment to FMV for the differences in taxes in each market. *Final Results*, 57 Fed. Reg. at 3183. Subsequent to Commerce's final results, the CAFC issued *Zenith Elecs. Corp. v. United States*, 11 Fed. Cir. (T) ____, 988 F.2d 1573 (1993). *Zenith* held 19 U.S.C. § 1677a(d)(1)(C) "does not provide for any adjustment to FMV to correct for tax-related distortion of the dumping margin." *Id.* at ____, 988 F.2d at 1580. Because *Zenith* precludes it from using the circumstance of sale statutory provision to account for the "multiplier effect" caused by the consumption tax, Commerce requests the Court to remand this issue for Commerce to make the necessary corrections.

Toyota and Nissan agree *Zenith* prevents Commerce from using the circumstance of sale adjustment in 19 U.S.C. § 1677b(a)(4)(B) (1988) to avoid multiplier effect distortions. Toyota and Nissan, however, argue *Zenith* permits Commerce to eliminate the multiplier effect by adjusting USP by the amount, instead of the rate of the *ad valorem* tax. According to defendant-intervenors, distortions to Commerce's calculation of dumping margins will result if an adjustment is not made.

Plaintiffs agree with Commerce that this case should be remanded to eliminate the circumstance of sale adjustment which *Zenith* held to be unlawful. Plaintiffs, however, claim defendant-intervenors' request to adjust FMV or USP on remand to account for the multiplier effect caused by the consumption tax is unlawful.

Commerce argued in *Zenith* it was necessary to use a circumstance of sale adjustment to lower the FMV amounts to avoid artificially inflating dumping margins. *Id.* at ____, 988 F.2d at 1578. The CAFC held title 19 permits Commerce to make tax adjustments only to USP, not to FMV. *Id.*

at ____, 988 F.2d at 1580. The CAFC pointed out the legislative history of 19 U.S.C. § 1677a(d)(1)(C) "does not suggest Congress sought tax neutrality when it fashioned the adjustment provision." *Id.* at ____, 988 F.2d at 1582. The court, however, added a suggested method of eradicating the multiplier effect:

> [Section 1677a(d)(1)(C)] by its express terms allows adjustment of USP in the *amount* of taxes on the merchandise sold in the country of exportation. While perhaps cumbersome, Commerce may eliminate the multiplier effect by adjusting USP by the amount, instead of the rate, of the *ad valorem* tax."

Id. at ____, 988 F.2d at 1582 n.4 (emphasis in original).

Pursuant to *Zenith* and title 19, this Court holds Commerce may not use a circumstance of sale adjustment to compute commodity tax adjustments. The Court remands this issue to Commerce for it to eliminate the use of 19 U.S.C. § 1677b(a)(4)(B) in accounting for the "multiplier effect." Additionally, because 19 U.S.C. 1677a(d)(1)(C) permits Commerce to adjust USP by the amount of the *ad valorem* tax, the Court directs Commerce to consider any further adjustments to USP consistent with *Zenith* and title 19.

B. *Model Match Methodology:*

Where there were no identical products sold in the home market, Commerce developed a model match procedure based on a point system of selected forklift characteristics to determine which models of forklifts sold in Japan it should compare with models sold in the United States. *Final Results,* 57 Fed. Reg. at 3167. This model match methodology, which differed from that used in the original investigation, was announced by Commerce after it considered the comments received from petitioner and all of the respondents. Commerce made product comparisons based on load capacity and six primary characteristics to which it had assigned points indicative of each characteristic's relative importance. *Id.* The six characteristics and their respective point values are as follows: tire type, six points; upright style, five points; engine type, four points; transmission type, three points; maximum forklift height, two points; and engine size, one point. *Id.* U.S. models with the same or most similar number of points as the home market models were considered to be the most similar merchandise.

Plaintiffs argue Commerce erroneously changed its methodology to obtain the most matches, rather than the most similar matches, of home market sales. NACCO maintains Commerce's goal of obtaining a higher volume of market sales for comparison purposes violated 19 U.S.C. § 1677(16) (1988) and 19 U.S.C. § 1677b(a)(1). Plaintiffs contend tire type should be the predominant characteristic in the model match methodology. According to plaintiffs, the tire type affects the entire frame structure of the truck, and it is the frame which is the single most important characteristic of a forklift truck. Plaintiffs claim that "[a]s long as the Department has found that the home market constitutes a viable market pursuant to 19 U.S.C. § 1677(17) and 19 C.F.R. § 353.48,

the number of home market sales used to match models should not play a role in the model match process." Plaintiffs' Reply at 9 (footnote omitted).

Commerce argues it changed its model match methodology "to preserve the single-most important characteristic, load capacity, to negate the 'veto' that tire type had over potential matches and to ensure the most similar matches by basing selection upon seven characteristics." Defendant's Brief at 27. Commerce points out tire type is the most important characteristic in its revised methodology, but does not have the disproportionate weight it had in the original investigation. Toyota, Toyo and Nissan argue Commerce correctly selected the most similar forklifts sold in Japan as the basis for determining FMV.

In determining FMV, Commerce must base its valuation on the price of "such or similar merchandise" sold in the home market. 19 U.S.C. § 1677b(a)(1)(A). "Such or similar merchandise" is defined in relevant part as follows:

> merchandise in the first of the following categories in respect of which a determination for the purposes of part II of this subtitle can be satisfactorily made:
>
> **(A)** The merchandise which is the subject of an investigation and other merchandise which is identical in physical characteristics with, and was produced in the same country by the same person as, that merchandise.
>
> **(B)** Merchandise—
>
> **(i)** produced in the same country and by the same person as the merchandise which is the subject of the investigation,
>
> **(ii)** like that merchandise in component material or materials and in the purposes for which used, and
>
> **(iii)** approximately equal in commercial value to that merchandise.

19 U.S.C. § 1677(16). Because there was not merchandise sold in the home market identical to that sold in the United States, Commerce properly relied on 19 U.S.C. § 1677(16)(B).

Commerce has broad discretion in choosing a methodology to carry out its statutory mandate. *NTN Bearing Corp. v. United States*, 14 CIT 623, 633, 747 F. Supp. 726, 736 (1990) *(NTN)*. Even if another alternative is more reasonable, Commerce has acted within its authority if its decision is reasonable. *ICC Indus.*, 5 Fed. Cir. (T) at 85, 812 F.2d at 699. In the underlying investigation of *NTN*, Commerce declined to adopt the methodology proposed by plaintiffs. The *NTN* Court held Commerce had considered suggestions from the interested parties before adopting a methodology and had provided reasonable explanations for the methodology it ultimately chose. *NTN*, 14 CIT at 634, 747 F. Supp. at 736. The Court stated plaintiffs had not provided any evidence of unreasonable behavior on Commerce's part. Plaintiffs thus failed to demonstrate Commerce's determination was not supported by substantial evidence. *Id.* at 633, 747 F. Supp. at 736.

Just as it did in the underlying investigation in *NTN*, Commerce solicited and considered comments from all of the parties concerning the model match methodology to be used. Similar to the *NTN* plaintiffs, plaintiffs in the instant action have failed to provide any evidence of Commerce's alleged unreasonable behavior. As Commerce noted in its final results, "[plaintiffs] failed to provide any specific examples regarding widespread, or even episodic, matches of dissimilar merchandise. Without such evidentiary support for their position, the Department can neither evaluate [plaintiffs'] claim nor reasonably alter its existing matching procedure." *Final Results*, 57 Fed. Reg. at 3183. While plaintiffs make sweeping allegations concerning the model match methodology, they do not provide the Court with specific examples of why Commerce's model match methodology is unlawful.

In support of their contention that Commerce's choice of model match methodology is contrary to law, plaintiffs cite the following language contained in a July 3, 1989 Commerce memo discussing its model match methodology: "Our main concern is that we find the most similar merchandise that is sold in commercial quantities in the home market * * *. This approach appears to be a reasonable solution in that it simplifies the matching process and creates the likelihood of a greater number of matches." AR 23 at 166. The Court, however, fails to see how this language proves Commerce was only interested in increasing the number of matches as plaintiffs aver. The first sentence of this quote merely tracks the language of 19 U.S.C. § 1677b(a)(1)(A) which requires Commerce to base FMV on "such or similar merchandise" sold in the home market "in the usual commercial quantities." 19 U.S.C. § 1677b(a)(1)(A). Commerce is therefore saying that its main concern is following its statutory mandate.

Similarly, the second sentence provides no support to plaintiffs' argument. Simply because Commerce's model match methodology had the potential of resulting in a greater number of matches does not prove this was Commerce's sole motive in changing its methodology. A careful reading of the entire document cited by plaintiffs, in fact, demonstrates this was not Commerce's motive. Commerce provided reasonable explanations for the change which were based on what Commerce learned in the investigation. Commerce was interested in finding a methodology that would not only negate the veto effect the tire type had played in the earlier methodology, but that would also categorize the merchandise along current industry standards. AR 23 at 166–67. Accordingly, this Court sustains Commerce's choice of model match methodology and "such or similar merchandise" determination.

C. *Transfer Prices:*

Plaintiffs argue Commerce accepted respondents' claims that their related party transfer prices were at arm's length without requiring the respondents to submit substantial evidence in support of these claims. NACCO contends Commerce unlawfully allowed respondents to "'create' their own methodologies and procedures for reporting their

data." Plaintiffs' Brief (Pl. Br.) at 22. Plaintiffs ask this Court to remand the issue to Commerce with instructions either to obtain proper data from the respondents or base its determination on best information available (BIA).

Commerce maintains it properly relied upon the transfer prices the respective respondents paid to their related suppliers. Transactions between related parties, Commerce contends, need only be disregarded if the transfer prices do not reflect fair market value. *See* 19 C.F.R. § 353.45(a) (1992).

1. *Nissan:*

With respect to Nissan, plaintiffs claim Commerce unlawfully permitted Nissan to submit its value-added data on an averaged basis rather than on a sale-by-sale basis. Plaintiffs contend Commerce should have compared Nissan's transfer prices with its related-suppliers' cost of production on a component by component basis rather than on an aggregated basis. Moreover, plaintiffs argue Commerce should not have allowed Nissan to select the home market and U.S. models it used to demonstrate its transfer prices were at arm's length. According to plaintiffs, Commerce violated 19 U.S.C. § 1677a(c) by relying on transfer prices to calculate Nissan's cost of production and value-added expenses.

Commerce avers it properly relied on Nissan's transfer prices because Nissan demonstrated the prices represented arm's length transactions. Furthermore, Commerce argues, there is no evidence on the record suggesting the transfer prices are unrepresentative of market prices. Nissan contends Commerce's use of Nissan's related party transfer prices is not only supported by substantial evidence on the record, but is consistent with Commerce's past practice. According to Nissan, "it would be almost impossible to use actual cost of production for parts supplied by Nissan's related suppliers for each individual forklift truck because it does not have a bill of materials for each forklift truck and constructing one would be a time consuming task." *Final Results*, 57 Fed. Reg. at 3173. In order to demonstrate its related supplier transfer prices were arm's length transactions, Nissan purported to show these prices were in the aggregate higher than the unrelated suppliers' cost of production. *Id.* at 3174.

Contrary to plaintiffs' assertions, Commerce may use related party transactions provided the transactions are arm's length in nature. *See* 19 C.F.R. § 353.45. Commerce, however, must be able to establish the transactions were arm's length based on substantial evidence on the record. Nissan supplied Commerce with documentation which compared the standard costs in calculating Nissan's cost of production to Nissan's related suppliers' cost of production. Conf. Doc. 71 at 2521A–22A, 2621A–45A. Additionally, Nissan submitted information regarding the prices at which Nissan's related suppliers sold their products to third parties. Conf. Doc. 19 at E–20 and Appendices E.VI.B.3 and E.VI.B.5.

Nissan also provided bills of material for representative forklift models. Conf. Doc. 19, Appendix E.VI.B.5 at 368A–389A.

Based on a careful examination of the record, the Court must conclude Commerce's determination to use Nissan's related party transfer prices is not based on substantial evidence on the record. Nissan supplied Commerce with cost information for related suppliers which indicates Nissan purchased a significant number of items [.] Conf. Doc. 19, Appendix E.VI.B.3. When Commerce received this information it had "reasonable grounds to believe or suspect that sales in the home market of the country of exportation * * * ha[d] been made at prices which represente[d] less than the cost of producing the merchandise in question." 19 U.S.C. § 1677b(b). Commerce was, thus, required to "determine whether, in fact, such sales were made at less than the cost of producing the merchandise." *Id.* It may be permissible for Commerce in certain instances to allow a respondent to demonstrate its related supplier transfer prices are arm's length transactions by providing evidence of prices in the aggregate being higher than the unrelated suppliers' cost of production. Where, however, a respondent purports to make such a showing by providing Commerce with pricing information which shows the respondent purchased such a significant number of items [ ], it is incumbent upon Commerce to make further inquiry. This Commerce failed to do. Accordingly, the Court orders Commerce on remand to point to substantial evidence on the record in support of its determination that Nissan's related party transfer prices were made at arm's length. If Commerce is unable to point to such evidence, the Court directs it to make any necessary adjustments.

2. *Toyota:*

At verification, Toyota informed Commerce that Toyota's subsidiary, Toyota Industrial Equipment (TIE), paid a related supplier, Toyota Motor Distributor (TMD), a rate for parts based on TMD's published price list divided by [ ]. Conf. Doc. 113. When plaintiffs objected at the administrative level to the use of Toyota's transfer prices, Toyota responded that its U.S. subsidiary paid the same price that other distributors paid. R. Doc. 113 at 2853A. In its final results, Commerce stated TMD granted TIE a discount on the materials purchased from TMD. *Final Results,* 57 Fed. Reg. at 3168. Commerce concluded, however, "[s]ince it is reasonable to expect that a distributor would not pay the same price as a dealer, the Department accepted TIE's reported material costs as reasonable." *Id.*

Plaintiffs claim Commerce improperly calculated Toyota's value-added material costs. NACCO contends the record does not contain evidence that prices paid by unrelated distributors to TMD were the same as prices paid by TIE to TMD. Moreover, plaintiffs argue Commerce's conclusion regarding distributor's paying a lesser price than dealers is not supported by record evidence. Plaintiffs ask the Court to remand this issue for Commerce to increase the cost of materials reported by

Toyota for parts purchased from TMD so they reflect the prices charged by TMD for sales of these parts to unrelated dealers.

Commerce claims its reliance on Toyota's material cost information was reasonable, because Commerce verified the information and examined Toyota's relationship with its suppliers. Commerce maintains it properly concluded the [ ] divisor represented the discount distributors receive from the dealer's price due to volume purchases. Toyota argues Commerce made a reasonable conclusion based on substantial evidence on the record that the purchase prices represented the fair market value for these parts to distributors.

The Court holds there is not substantial evidence on the record to support Commerce's final results with respect to Toyota's transfer prices. The only record evidence Toyota and Commerce can point the Court to is a TMD dealer price list which has a handwritten notation of [ ]. Conf. Doc. 113. This minimal amount of evidence is not such relevant evidence as a reasonable mind might accept as adequate to support the conclusion Toyota's transfer prices were at arm's length. *See Matsushita Elec. Indus. Co. v. United States,* 3 Fed. Cir. (T) 44, 51, 750 F.2d 927, 933 (1984) (citations omitted). The Court, therefore, directs Commerce on remand to point to substantial evidence on the record in support of its determination that Toyota's transfer prices are at arm's length. If Commerce is unable to point to such evidence, the Court orders it to make any necessary adjustments.

3. *Toyo:*

Plaintiffs argue Toyo failed to establish its purchases from related suppliers were arm's length transactions and Commerce's determination is thus not based on substantial evidence on the record. Plaintiffs seek a remand with directions to Commerce either to require Toyo to submit the information originally requested by Commerce or to use BIA.

Commerce maintains it properly calculated Toyo's value-added costs and plaintiffs' argument otherwise is without merit. Toyo contends Commerce properly determined an arm's length pricing analysis from Toyo's related suppliers would not be necessary because of Toyo's limited ownership interest in the suppliers and minimal cost accounted for by inputs purchased from them.

The Court holds plaintiffs argument is without merit. Based on substantial record evidence, Commerce determined Toyo's purchases from suppliers were at arm's length. Commerce properly based its decision not to require an arm's length analysis on the following: (1) Toyo's ownership interest in the related suppliers was less than [ ]; (2) the portion of total costs provided by the relevant inputs was insignificant [ ]; and (3) because more than [ ]. *See* Conf. Doc. 76 at 2463A; Rec. Doc. 364 at 1627; Rec. Doc. 260 at 1638–39; Conf. Doc. 5 at 159A–160A, 178A; Conf. Doc. 45 at 186A, 360A–378A.

D. *Other Value-Added Costs:*

Where an exporter makes alterations to its merchandise at facilities in the United States, any additional expenses incurred, value-added expenses, must be deducted from USP. 19 U.S.C. § 1677a(e)(3). Subsection (e)(3) provides the following:

> **(e) Additional adjustments to exporter's sales price.**—For purposes of this section, the exporter's sales price shall also be adjusted by being reduced by the amount, if any, of—
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> * * * * * * *
>
> (3) any increased value, including additional material and labor, resulting from a process of manufacture or assembly performed on the imported merchandise after the importation of the merchandise and before its sale to a person who is not the exporter of the merchandise.

19 U.S.C. § 1677a(e)(3). Plaintiffs complain Commerce has failed to follow this statutory mandate and as a result has artificially reduced Nissan's and Toyota's dumping margins.

1. *Nissan's U.S. Value-Added Costs:*

Plaintiffs contend Commerce improperly treated some of Nissan's value-added costs as indirect selling expenses. According to plaintiffs Commerce should have required Nissan to report the value-added portion of the work done at its Mansfield, Massachusetts facility which involved receiving and shipping, not selling, the forklifts. Additionally, plaintiffs argue Commerce erred in not requiring Nissan to submit its total value-added labor and overhead costs on a sale-by-sale basis as Toyo and Toyota did. Plaintiffs complain Commerce must rely on BIA if Nissan is unable to provide the data requested by Commerce. *See* 19 U.S.C. § 1677e(c).

Based on its practice of accepting respondents' reasonable accounting methodologies, Commerce argues it properly treated expenses incurred by Nissan at its Mansfield facility as indirect selling expenses. Despite Commerce's preference for sale-by-sale reporting, it maintains it will use the respondent's own accounting methodology if, as was the case with Nissan's methodology, it is reasonable and does not distort costs.

Nissan contends Commerce did not err in its decision to treat expenses incurred at the Mansfield facility as indirect selling expenses. According to Nissan, "[d]ata regarding the value-added costs incurred by [Nissan's] Mansfield facility do not exist because of the manner in which that facility is independently managed and operated[.]" Nissan's Brief at 34–35. Furthermore, because the Mansfield facility performs some work on all Nissan forklift trucks, including those not within the scope of this administrative review, the only appropriate basis for allocating Nissan's total shop costs, Nissan maintains, is to allocate as Commerce did—over all of the trucks on which work was performed.

The Court holds Commerce has reasonably interpreted and applied the statute based on the information submitted by Nissan. *See ICC Indus.*, 5 Fed. Cir. (T) at 85, 812 F.2d at 699. Commerce was not required to

resort to BIA pursuant to either 19 U.S.C. § 1677e(b) or (c). Commerce was able to verify the accuracy of the information Nissan submitted, therefore it would be inappropriate to base BIA on 19 U.S.C. § 1677e(b). *See Final Results,* 57 Fed. Reg. at 3175. Moreover, 19 U.S.C. § 1677e(c) is inapplicable because Commerce may not resort to BIA "where a submitter cannot produce data because such data never existed." *Olympic Adhesives, Inc. v. United States,* 8 Fed. Cir. (T) 69, 78, 899 F.2d 1565, 1573 (1990). Commerce acted reasonably in accepting Nissan's accounting methodology. Accordingly, plaintiffs argument regarding Nissan's U.S. value-added costs fails.

2. *Toyota's Value-Added Labor Costs:*

In the final results, Commerce accepted Toyota's allocation of employee benefits expenses to overhead after finding "the allocation was reasonable because Toyota included fringe benefits in the value-added overhead." *Final Results,* 57 Fed. Reg. at 3168. Plaintiffs claim Commerce should have treated Toyota's employee benefit costs as direct labor costs. Plaintiffs charge Commerce has acted contrary to its longstanding practice of requiring respondents to include the cost of employee benefit programs in their direct labor costs.

While Commerce admits it normally treats employee benefits expenses as direct labor expenses, it contends it properly treated Toyota's fringe benefits expenses as overhead expenses because Toyota provided Commerce with a reliable, reasonable accounting methodology used in the normal course of business. Toyota argues Commerce correctly categorized its employee fringe benefits expenses. Moreover, because Commerce deducts both labor and overhead from USP, Toyota claims a recategorization of its employee fringe benefits would not change the value-added calculation.

While it would appear to the Court the better way of accounting for employee fringe benefits is to treat them as direct labor expenses, as Commerce concedes is its normal practice, the Court is unable to hold Commerce has acted unlawfully or abused its discretion in accepting Toyota's accounting methodology. *See Udall v. Tallman,* 380 U.S. 1, 16 (1965), *quoted in Zenith Radio Corp. v. United States,* 437 U.S. 443, 450 (1978) ("[W]e need not find that [the agency's] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.") (quotations and citations omitted); *ICC Indus.,* 5 Fed. Cir. (T) at 85, 812 F.2d at 699 ("An agency's 'interpretation of the statute need not be the *only* reasonable interpretation or the one which the court views as the most reasonable.'") (emphasis in original) (citation omitted). The Court sustains Commerce's treatment of Toyota's employee fringe benefits and dismisses plaintiffs' argument with respect to this issue.

E. *Commerce's Decision Not To Verify Cost of Production Data:*

Commerce initially scheduled cost of production verifications for Nissan and Toyo, "but was forced to reevaluate the utility of these verifications after hostilities in the Persian Gulf curtailed the Department's

verification activities." *Final Results,* 57 Fed. Reg. at 3177. Commerce determined Nissan's and Toyo's submissions were satisfactory and verification would be unnecessary "[g]iven that these verifications were not required, and in light of the successful verification of all other aspects of Nissan's and [Toyo's] sales[.]" *Id.*

Plaintiffs complain Commerce must reschedule the cost of production verification for Nissan and Toyo, because nothing has changed in the context of this review to alter the need to verify the information. According to plaintiffs, good cause exists for verifying the cost of production information due to Nissan's incomplete data and the fact Toyo's cost data has never been verified. Moreover, plaintiffs take exception to Commerce assuming the two respondents' cost data are reliable because Commerce found both respondents' sales data to be accurate.

Commerce argues it properly determined it was not necessary to verify Nissan's and Toyo's cost data because it had other indicia of reliability of this information. Commerce contends its initial decision, that good cause existed to verify, was superseded by the verification of all of Nissan's and Toyo's sales and United States cost of production data. Commerce refutes plaintiffs' argument of a lack of relationship between the sales data and cost of production data by arguing the parties themselves were shown to be reliable by the fact they submitted accurate sales data. Both Nissan and Toyo support Commerce's position.

Verification of information relied upon in making a determination is mandated where

> **(A)** verification is timely requested by an interested party * * *, and
>
> **(B)** no verification was made under this paragraph during the 2 immediately preceding reviews and determinations under that section of the same order, finding, or notice, except that this clause shall not apply if good cause for verification is shown.

19 U.S.C. § 1677e(b). *See also* 19 C.F.R. § 353.36 (1992). Neither of the situations in which Commerce must conduct verification is present in this case. The first situation requires that an interested party request the verification and that there not have been verification in the two immediately preceding reviews. Although NACCO, an interested party, has requested Commerce to verify Nissan's and Toyo's cost of production data, this proceeding is only the first antidumping administrative review. Thus the second required element of the statute, that verification had not occurred during the two immediately preceding reviews, is not present.

Verification will also be required where Commerce has determined "good cause for verification is shown." Commerce initially determined good cause for verification existed as illustrated by the fact it scheduled verification for Nissan's and Toyo's cost of production data. However, at the time verification would have taken place, after the delay caused by the Persian Gulf War, Commerce reevaluated the situation to determine whether good cause for verification was still present. Commerce con-

cluded good cause for verification at that time had not been shown, and was therefore unnecessary. The Court holds Commerce was within its discretion in making such a determination regarding the absence of good cause and rejects plaintiffs' arguments to the contrary.

F. *Nissan's Home Market Rebates:*

Plaintiffs claim Commerce has violated 19 C.F.R. § 353.56 (1992) by unlawfully granting Nissan an adjustment to FMV for the following home market rebates: [ ]. *See* CR 19 at B–7, B–9, B–11. Plaintiffs maintain the rebates are not indirect selling expenses and cannot be deducted from home market price. Plaintiffs ask the Court to remand the *Final Results* with respect to this issue for Commerce to eliminate any adjustment to FMV based on these rebates.

Commerce argues there is sufficient evidence to grant Nissan an adjustment for these rebates as indirect selling expenses because [" "]. Defendant's Brief at 44. According to Nissan, the rebates are designed to support sales to end customers through the establishment and maintenance of a strong dealer network. Nissan argues the rebates are related to the maintenance and improvement of Nissan's sales distribution system and are, therefore, properly treated as indirect selling expenses.

Plaintiffs claim Commerce has violated the following regulations:

> (a) *In general.* (1) In calculating foreign market value, the Secretary will make a reasonable allowance for a *bona fide* difference in the circumstances of the sales compared * * *. In general, the Secretary will limit allowances to those circumstances which bear a direct relationship to the sales compared.
>
> * * * * * * *
>
> (b) *Special Rule* * * *. (2) In comparisons with exporter's sales price, the Secretary will make a reasonable deduction from foreign market value for all expenses, other than those described in paragraph (a)(1) or (a)(2), incurred in selling such or similar merchandise * * *.

19 C.F.R. § 353.56. Because Commerce treated the rebates at issue as indirect, not direct, selling expenses, 19 C.F.R. § 353.56(a)(1) is inapplicable and plaintiffs' first argument fails. For their second argument, plaintiffs maintain Nissan's rebates are not expenses "incurred in selling such or similar merchandise." Plaintiffs, however, were unable to provide the Court with record evidence supporting their position that "[t]he sale of spare parts and the servicing of forklift trucks are separate operations and the expenses relating to those operations cannot lawfully be attributed to the sale of new forklift trucks." Pl. Br. at 42–43; *see also* Pl. Supp. Br. at 5. Plaintiffs were thus unable to demonstrate to the Court the Nissan rebates were not "incurred in selling such or similar merchandise." Absent such a demonstration, plaintiffs' argument fails and the Court sustains Commerce's determination with respect to Nissan's home market rebates.

G. *Errors in Toyo's Database:*

Plaintiffs and defendant agree corrections to Toyo's database are necessary and request the Court remand the matter with respect to this issue. Accordingly, the Court remands this issue and orders Commerce to correct the errors in Toyo's database.

H. *Toyota's Labor and Product Liability Expenses:*

Plaintiffs argue Toyota overstated its average hourly labor costs by failing to subtract the costs for hours paid, but not physically worked. According to plaintiffs, Toyota must base its hourly labor cost on the hours worked, not the hours paid. Additionally, plaintiffs contend Toyota's allocation methodology concerning product liability expenses was improper because it allocated unit costs for product liability insurance over a ten year period.

Commerce claims it verified Toyota properly accounted for its labor costs and product liability expenses and made appropriate adjustments to Toyota's USP. *See* 19 U.S.C. § 1677a. Commerce based its acceptance of Toyota's treatment of these expenses on its practice of accepting respondent's accounting methodologies which are reasonable and used in the normal course of business. In accepting Toyota's accounting methodology, Commerce maintains it acted reasonably and in accordance with law.

Toyota argues Commerce correctly calculated Toyota's USP with respect to value-added labor costs and product liability premiums. According to Toyota, because its workers "spend only a minor portion of their time on [value-added] activities, it is appropriate to attribute vacation time to overhead and selling expense, and to attribute to value-added activities only time related to value-added activities." Toyota Br. at 15.

Commerce verified Toyota's value-added labor costs and also "verified that the product liability expenses are reasonably allocated over all trucks currently in service by verifying all of Toyota's insurance documents for the period[.]" *Final Results,* 57 Fed. Reg. at 3170. The Court is unable to hold Commerce has acted unlawfully or abused its discretion in accepting Toyota's accounting methodology. *See Zenith,* 437 U.S. at 450; *ICC Indus.*, 5 Fed. Cir. (T) at 85, 812 F.2d at 699. The Court, therefore, sustains the final results as they pertain to this issue.

Conclusion

After considering all of plaintiffs', defendant's and defendant-intervenors' arguments, the Court makes the following holdings: (1) Commerce is not required to conduct a test of consumer tax incidence and its determination that the Japanese consumption tax was included in the price of defendant-intervenors' subject imports is based on substantial evidence on the record; (2) Commerce may not use a circumstance of sale adjustment to compute commodity tax adjustments, and therefore the Court remands this issue to Commerce for it to eliminate the use of 19 U.S.C. § 1677b(a)(4)(B) in accounting for the "multiplier effect," and to consider any further adjustments to USP consistent with *Zenith* and

title 19; (3) Commerce's choice of model match methodology and "such or similar merchandise" determination is based on substantial evidence on the record and is otherwise in accordance with law; (4) there is not substantial evidence on the record to support Commerce's final results with respect to Nissan's transfer prices, and therefore, the Court directs Commerce on remand either to point to such evidence or, if it is unable to do so, to make any necessary adjustments; (5) there is not substantial evidence on the record to support Commerce's final results with respect to Toyota's transfer prices, and therefore, the Court directs Commerce on remand either to point to such evidence or, if it is unable to do so, to make any necessary adjustments; (6) Commerce properly determined Toyo's purchases from suppliers were at arm's length; (7) Commerce acted reasonably in accepting Nissan's accounting methodology regarding Nissan's U.S. value-added costs; (8) Commerce's treatment of Toyota's employee fringe benefits was in accordance with law; (9) Commerce was within its discretion in determining good cause for verification of Nissan's and Toyo's cost of production data did not exist; (10) Commerce's treatment of Nissan's home market rebates is based on substantial evidence on the record; (11) Commerce is ordered to correct the errors in Toyo's database; and (12) Commerce properly accounted for Toyota's value-added labor costs and product liability premiums.

Commerce's remand results are due April 11, 1994. Any comments or responses by the parties to the remand are due May 11, 1994, and shall be limited to fifteen pages. Any rebuttal comments are due May 26, 1994, and shall be limited to ten pages.

(Slip Op. 94–35)

UNITED STATES, PLAINTIFF *v.* DE BELLAS ENTERPRISES, INC. AND ANTHONY DE BELLAS, DEFENDANTS

Court No. 92–10–00669

[Defendant Anthony De Bellas' Motion to Dismiss is denied].

(Dated March 3, 1994)

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(A David Lafer* and *Marc E. Montalbine)* for plaintiff.

Fotopulos, Spridgeon & Perez, P.A. (Thomas E. Fotopulos) for defendant De Bellas.

MEMORANDUM OPINION AND ORDER

MUSGRAVE, *Judge:* This is an action for enforcement of civil penalties and duties pursuant to 19 U.S.C. § 1592. The government alleges in its Complaint that defendants defrauded the government by submitting

false invoices on wearing apparel from Australia. Pursuant to USCIT Rule 12(b)(5), defendant moves for summary judgment and the government opposes. Defendant alleges several facial insufficiencies in plaintiff's Complaint, as well as a complete defense by reason of a statute of limitations. Defendant does not prevail based on allegations of facial insufficiency. The Court reserves judgment with regard to the statute of limitations as detailed below.

Defendant first alleges that plaintiff failed to follow administrative procedures and thus failed to adequately state a claim upon which relief could be granted. *See* USCIT R. 12(b)(5). Specifically, defendant alleges that plaintiff failed to follow the administrative procedures set forth in 19 U.S.C. § 1592(b)(1)(A), which include a requirement to serve a pre-penalty notice on the *person* of the subject of the investigation. This claim is without merit.

The Court of Appeals for the Federal Circuit has held that when the individual is the alter-ego or principal of the target company subject to the notice, specific service on that individual is not required. *United States v. Priority Products, Inc.*, 4 Fed. Cir. (T) 88, 793 F.2d 296 (Fed. Cir. 1986). The *Priority Products* court further held that defendant's due process rights were not violated where defendant had clear notice and opportunity to prepare an adequate defense. *See id.* Defendant signed a plea agreement on January 30, 1990 admitting criminal liability in connection with entry number 86–684270–3, filed with Customs on December 30, 1985. In the plea agreement, defendants conceded that "nothing in this plea agreement will affect the Government's right to seek civil penalties in the International Court of Trade * * *." *See Plea Agreement, para. 4, at 2 (January 30, 1990).* Subsequently, mitigation proceedings were briefly entertained regarding 56 consumption entries filed between September 13, 1984 and October 15, 1987. Defendant cannot now assert that he did not have adequate notice of the present suit. Pre-penalty notice served upon De Bellas Enterprises, Inc. was sufficient.

Defendant's second allegation of facial insufficiency of the pleading in the Complaint is more serious. Defendant argues that because plaintiff failed to allege discovery of the fraud, it is impossible to grant relief. 19 U.S.C. § 1621 limits actions to recover penalties among other assessments, based on fraud, to those commenced within five years after the alleged offense was discovered. *See* 19 U.S.C. § 1621. Without knowledge of when the fraud was discovered, the Court is unable to make an accurate determination as to section 1621's applicability. The identical issue has been raised in this Court in a series of cases where the Court did not find the failure to plead discovery fatal *per se. See United States v. Modes,* CIT ____, Slip Op. 92–174 (October 9, 1992); *United States v. Gordon,* 7 CIT 350 (1984) (government required merely to amend Complaint where no prejudice to defendant demonstrated at early stage in litigation); *United States v. Thorson Chem. Corp.*, ____ CIT ____, Slip Op. 92–84 at 9, n.5 (May 28, 1992) (defendant not prejudiced when it had

opportunity to file opposing brief after government filed motion to strike affirmative defense of statute of limitations). Rather, the Court inquired whether defendant had demonstrated actual prejudice by said failure. *See Modes,* Slip Op. 92–174 at 18; *Gordon,* 7 CIT at 352. In *Modes,* defendant was not prejudiced because the earliest time at which Customs could have discovered the fraud was *still* within the five year statute of limitations. Defendant here, in its skeletal three-page Motion to Dismiss did not allege any prejudice whatever, and the Court declines to so conclude *sue sponte.*

Accordingly, plaintiff is granted leave to amend its Complaint to include facts and assertions regarding discovery of fraud for the entries spanning 1984 to 1987. While this portion of defendant's Motion to Dismiss is denied, defendant will be afforded an opportunity to rebut plaintiff's forthcoming assertions, if any, in the amended Complaint.

Lastly, defendant asserts that plaintiff's action is barred by the five year statute of limitations governing the collection of penalties. *See* 19 U.S.C. § 1621. Defendant's supporting assertion that plaintiff knew about the fraud at the time of each entry is baldly contradicted by defendant's own claim with respect to failure to plead discovery. Thus, defendant's one-sentence assertion in its Motion to Dismiss is insufficient to form the basis of a decision and the Court will address that issue upon receipt of the amended Complaint.

Plaintiff argues, in addition, that its action is not merely for penalties but for lost duties under 19 U.S.C. § 1592(d). Plaintiff has maintained in this and other cases before the Court that section 1621 applies merely to penalties, not duties. Therefore, plaintiff would have the Court hold that there is no statute of limitations precluding it from moving to collect past duties.[1] The Court reserves decision on this issue until the amended Complaint is filed.

(Slip Op. 94–36)

LEE YUEN FUNG TRADING CO., INC., PLAINTIFF *v.*
DEPARTMENT OF THE TREASURY, U.S. CUSTOMS SERVICE, DEFENDANT

Court No. 92–07–00446

[On classification of tea from China, partial summary judgment for the plaintiff.]

(Decided March 3, 1994)

Yuen & Yuen (Veronica C. Yuen) for the plaintiff.

Frank W. Hunger, Assistant Attorney General; *Joseph I. Liebman,* Attorney-in-Charge, International Trade Field Office, Commercial Litigation Branch, U.S. Department of Justice, Civil Division *(Nancy M. Frieden)* for the defendant.

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[1] On December 8, 1993, the Customs Modernization Act was signed into law, specifically preventing the government from commencing a court action pursuant to 19 U.S.C. § 1592(d) to collect duties owing on entries more than five years from the date of entry.

MEMORANDUM

AQUILINO, *Judge:* This action arises out of classification of Ching Hsin Green Tea by the U.S. Customs Service under subheading 2106.90.60 of the Harmonized Tariff Schedule of the United States ("HTS") ("Food preparations not elsewhere specified or included * * *: Other * * *: Other"). The complaint avers that the merchandise is a tea pellet consisting mostly of jasmine green tea (34%) and honey (30%) and is thus classifiable under HTS subheading 0902.20.00 ("Other green tea (not fermented)"), with entry thereof free of duty.

I

At commencement, this action sought to encompass three entries of such merchandise. However, entry No. D77–00077036 was ordered severed herefrom by the court and dismissed under CIT No. 92–07–00446–S upon report of the parties that it had in fact been classified by Customs in the manner for which the plaintiff pleads. As for the remaining two entries, the plaintiff depicts them as follows:

Case	*Entry No.*	*Protest No.*	*Date of Liquidation*
(a)	00070528	1001–1–103210 (filed 4/16/91)	2/1/91
(b)	00056170	1001–1–201267 (filed 3/19/91)	12/28/90
	duplicate protest	1001–1–103209 (filed 4/16/91)	

Affirmation of Veronica C. Yuen, para. (2). This affirmation, which is part of a motion by the plaintiff for summary judgment, proposes to refer to these entries as Case (a) and Case (b) for ease of discussion. The court agrees. The motion asserts that protests of the Service's classification of them were each denied as untimely. *See id.*, paras. (4) and (5).

In its answer, however, the defendant had admitted that the protest was "timely filed" in Case (a), just as it admitted that the third entry had been liquidated as claimed under HTS 0902.20.00, ergo the afore-mentioned severance and dismissal. In any event, issue is joined as to the timing of plaintiff's protest in Case (b). To quote from defendant's first pleaded affirmative defense:

> 19. Entry No. D77–00056170 was off line reliquidated on December 10, 1990.
>
> 20. Protest No. 1001–1–103209 regarding Entry No. D[ ]77–00056170 was filed on April 16, 1991.
>
> 21. 19 U.S.C. § 1514(c)(2)(A) requires that a protest be filed within 90 days after but not before notice of liquidation or reliquidation.
>
> 22. Since the reliquidation of Entry No. D77–00056170 was not protested within 90 days of December 10, 1990, this Court lacks jurisdiction over Protest No. 1001–1–103209.

Plaintiff's motion attempts to dispel any confusion about that case as follows:

> * * * The protest was filed with the District Director, U.S. Customs Service at Newark, New Jersey on March 15, 1991. Said protest was transferred to the New York District Director on March 19, 1991 (Exh. B). The protest number * * * is 1001–1–201267. Said protest was denied on February 6, 1992, with instruction to file the protest on Customs Form 19 (Exh. C). Prior to the decision on protest number 1001–1–210267, a protest was filed on Customs Form 19 on April 16, 1991, under * * * number 1001–1–103209 (Exh. D). Said protest was denied as being untimely. That denial is clearly erroneous[ ] pursuant to the decision dated February 6, 1992 (Exh. C). The protest, filed on March 19, 1991, * * * was found to be timely and that the importer ha[d] 30 days from February 6, 1992 to file a protest on Customs Form 19 * * *.

Affirmation of Veronica C. Yuen, para. (5).

A

Given the facts and circumstances presented herein, including defendant's admission, the court clearly has subject-matter jurisdiction over Case (a) pursuant to 28 U.S.C. § 1581(a), which is linked statutorily to 19 U.S.C. § 1515. The latter, in turn, refers to protests filed in accordance with section 1514, subsection (c)(2) of which calls for their filing within 90 days after but not before notice of liquidation or reliquidation. Finally, section 1514 is linked to 28 U.S.C. § 2636(a), which requires commencement of actions like this within 180 days after their denial. These provisions amount to a waiver of the sovereign's immunity, and such a waiver must be strictly construed. *E.g., Peking Herbs Trading Co. v. United States,* 17 CIT ____, ____, Slip Op. 93–210, at 3 (Nov. 3, 1993). Moreover, motions of the kind at bar are also held to a strict standard, to wit, summary judgment cannot issue if they engender a genuine issue as to any material fact. *E.g.,* CIT Rule 56(d).

In regard to the issue of jurisdiction over Case (b), exhibit G to plaintiff's motion comprises the referenced, 13–page March 1991 submission to Customs which "protests the duty assessed and requests a reconsideration" of the classification. That submission sets forth more than adequate information for the Service to discern the nature of plaintiff's position. *Cf. Mattel, Inc. v. United States,* 72 Cust.Ct. 257, 262, C.D. 4547, 377 F.Supp. 955, 960 (1974) ("however cryptic, inartistic, or poorly drawn a communication may be, it is sufficient as a protest for purposes of section 514 if it conveys enough information to apprise knowledgeable officials of the importer's intent and the relief sought"). Equally important, Customs recognized that the submission "was presented within the time limit prescribed under Section 514", albeit also calling upon the plaintiff to file preferred Protest Form 19.[1]

[1] Affirmation of Veronica C. Yuen, Exhibit C. The court notes in passing that, in addition to the Form 19, the Service's governing regulation, 19 C.F.R. § 174.12(b), does accommodate "a form of the same size clearly labeled 'Protest' and setting forth the same content in its entirety, in the same order, addressed to the district director."

The Service response is couched in the language of 19 U.S.C. § 1520 (c)(1) *viz.* "reliquidate an entry to correct * * * a clerical error, mistake of fact, or other inadvertence". That reference was the basis stated for denial of plaintiff's March 1991 submission. *See* Affirmation of Veronica C. Yuen, Exhibit C. However, in *Donjon Marine Co. v. United States,* 12 CIT 100 (1988), letters had been filed with Customs, requesting that the duties remitted under protest be returned. The Service responded with what apparently was a similar statutory reference. The plaintiff Donjon thereupon did file a Form 19. It was denied. When Customs moved to dismiss the ensuing case for lack of jurisdiction, the court found the existence of an actionable protest, even if "informal":

> * * * Customs never advised plaintiff that its protest was untimely or insufficient or that the time for filing a formal protest had expired. *Cf. Farrell Lines, Inc. [v. United States,* 69 CCPA 1, 4, C.A.D. 1268, 657 F.2d 1214, 1216–17 (1981)]. Here, also, confusion existed on the part of both parties. Plaintiff believed that it had protest[ed] on the ground that excessive duty had been levied on * * * full value * * * (a substantive issue) and Customs denied the letter of protest on the ground that no § 520 error existed (clerical), even though plaintiff had made no § 520 claim.
>
> In such a situation, particularly where the party seeking relief has relied on Customs officials for guidance, dismissals should be granted sparingly. *Dann v. Studebaker Packard Corp.,* 288 F.2d 201, 215 (6th Cir. 1961). Accordingly, this court holds that a valid and timely protest was filed herein.[2]

In this action, given the lodging of the March 1991 protestation within 90 days of the liquidation, which the court finds to have occurred on December 28, 1990[3], the plaintiff successfully stopped the running of the statute of limitations as against its contested entries.[4]

II

The fact that the plaintiff has properly invoked the jurisdiction of the court does not necessarily lead, however, to summary adjudication of its claim(s) about the nature of the subject matter. Although the defendant does not dispute the contention that the merchandise contains a mixture of 34 green tea, 30% honey and 36% spice[5], this court cannot decide on the papers now at hand whether such mixture is the equivalent of the "Other green tea (not fermented)" of HTS 0902.20.00. While the implication of the disposition of the entry severed herefrom is in the affirmative, summary judgment cannot be granted on such a basis. Furthermore, the agency with the expertise and primary responsibility in the matter, the U.S. Customs Service, has yet to take the opportunity

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[2] 12 CIT at 102–03. To the extent that the plaintiff herein, much like the one in *Donjon*, filed a Form 19 protest, numbered 1001–1–103209 (April 16, 1991), its denial as "[u]ntimely filed" is of no import. *See* Affirmation of Veronica C. Yuen, Exhibit D.

[3] *See* Affirmation of Veronica C. Yuen, Exhibits D and G; Reply Affirmation of Veronica C. Yuen, Exhibit A.

[4] In reaching this conclusion, the court does not imply, however, that compliance with form is not important to preservation of one's rights in regard to the flow of goods into this country. Certainly, it is, and it must be.

[5] *See* Defendant's Statement of Material Facts About Which There Is No Genuine Issue To Be Tried, para. 2.

to consider reclassification of the merchandise remaining under valid protest.

Customs should have that opportunity, and partial summary judgment in favor of the plaintiff will enter therefor, remanding the merits for appropriate disposition by the Service. In all other respects, plaintiff's motion must and therefore will be denied.

(Slip Op. 94–37)

TORRINGTON CO., PLAINTIFF, AND FEDERAL-MOGUL CORP., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF INDUSTRIE, S.P.A., AND FAG CUSCINETTI S.P.A., DEFENDANT-INTERVENORS

Court No. 91–08–00568

Plaintiff moves pursuant to Rules 1 and 7 of the Rules of this Court for modification of this Court's decision in *Torrington Co. v. United States,* 17 CIT ___, 832 F. Supp. 365 (1993), asking this Court to remand this case to the Department of Commerce, International Trade Administration ("ITA"), to recalculate all antidumping duty margins without allowing a deduction for pre-sale inland freight in the calculation of foreign market value ("FMV") pursuant to the United States Court of Appeals for the Federal Circuit's decision in *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* No. 93–1239 (Fed. Cir. Jan. 5, 1994). In addition, the ITA has filed remand results pursuant to *Torrington Co. v. United States,* 17 CIT ___, Slip Op. 93–234 (Dec. 10, 1993).

Held: This case is remanded to the ITA to implement its new value added tax ("VAT") methodology, to recalculate the VAT in this case pursuant to the partial final judgment on this issue previously entered in this case, and to use the newly calculated VAT to determine best information available ("BIA") for U.S. discounts. In addition, the ITA will determine whether it has statutory authority to adjust FMV, calculated using purchase price, for only FAG's pre-sale inland freight in light of *Ad Hoc Comm.*, No. 93–1239.

[Plaintiff's motion granted in part; case remanded.]

(Dated March 4, 1994)

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Geert De Prest, Margaret E.O. Edozien, William A. Fennell, Wesley K. Caine, Myron A. Brilliant, Robert A. Weaver, Patrick J. McDonough and *Amy S. Dwyer)* for plaintiff.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, J. Eric Nissley, Joseph A. Perna, V and *Larry Hampel)* for plaintiff-intervenor Federal-Mogul Corporation.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis* and *Jane E. Meehan);* of counsel: *John D. McInerney*, Acting Deputy Chief Counsel for Import Administration, *Dean A. Pinkert, Stephen J. Claeys, D. Michael Kaye* and *Douglas S. Cohen*, Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Howrey & Simon (Herbert C. Shelley, Scott A. Scheele, Alice A. Kipel, Thomas J. Trendl and *Juliana M. Cofrancesco)* for defendant-intervenors SKF USA Inc. and SKF Industrie, S.p.A.

Grunfeld, Desiderio, Lebowitz & Silverman (Max F. Schutzman, David L. Simon, Andrew B. Schroth, Matthew L. Pascocello and *Jeffrey S. Grimson)* for defendant-intervenor FAG Cuscinetti SpA.

OPINION

TSOUCALAS, *Judge:* Plaintiff, The Torrington Company ("Torrington"), moves pursuant to Rules 1 and 7 of the Rules of this Court for

modification of this Court's decision in *Torrington Co. v. United States*, 17 CIT ____, 832 F. Supp. 365 (1993), asking this Court to remand this case to the Department of Commerce, International Trade Administration ("ITA"), to recalculate all antidumping duty margins without allowing a deduction for pre-sale inland freight in the calculation of foreign market value ("FMV") pursuant to the United States Court of Appeals for the Federal Circuit's decision in *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, No. 93–1239 (Fed. Cir. Jan. 5, 1994). *Motion of The Torrington Company to Modify Judgment and Issue a Second Remand Order ("Torrington's Motion").*

In addition, the ITA has filed its Final Results of Redetermination Pursuant to Court Remand, *The Torrington Company v. United States* Slip Op. 93–234 (December 10, 1993) *("Remand Results")*, regarding the ITA's treatment of value added taxes ("VAT") and FAG Cuscinetti SpA's U.S. market discounts.

BACKGROUND

In *Torrington*, 17 CIT at ____, 832 F. Supp. at 374, this Court stated that:

> The reasoning of this Court in upholding the ITA's treatment of pre-sale inventory carrying costs in this case is equally applicable to the ITA's treatment of pre-sale movement expenses. The ITA's decision to compare U.S. price to home market price at a contemporaneous point in the chain of commerce is reasonable. *Torrington Co.*, 17 CIT at ____, 818 F. Supp. at 1576. In this case, the ITA has chosen an ex-factory price as the contemporaneous point in the chain of commerce. In order to make this comparison certain expenses need to be removed from both U.S. and home market prices. This Court finds nothing unreasonable in the ITA's removal of pre-sale movement expenses from both U.S. and home market prices as measured from the same point in the chain of commerce, in this case ex-factory. *Id.* at 33–34; *Ad Hoc Comm.*, 16 CIT at ____, 787 F. Supp. at 211–13. This method of treating pre-sale home market movement expenses has also been specifically upheld by this court in a well reasoned opinion in *Nihon Cement Co. v. United States*, 17 CIT ____, Slip Op. 93–80 at 30–34, 1993 WL 185208 (May 25, 1993).
>
> Therefore, this Court affirms the ITA's deduction of FAG's pre-sale movement expenses from FMV.

In *Torrington Co. v. United States*, 17 CIT ____, ____, Slip Op. 93–234 (Dec. 10, 1993) at 14–15, this Court

> enter[ed] final judgment on [the VAT] issue ordering the ITA to apply Italy's VAT rate to USP [U.S. price] calculated at the same point in the stream of commerce as where Italy's VAT is applied for home market sales and add the resulting amount to USP. This case is remanded to the ITA to apply its current administrative practice and choose appropriate BIA for the adjustment to FAG's USP for U.S. market discounts and to treat the adjustment as a direct selling expense.

DISCUSSION

1. *Motion to Modify Judgment:*

The Federal Circuit in *Ad Hoc Comm.* stated:

> In the circumstances of this case, we believe that had Congress intended to deduct home-market transportation costs from FMV, it would have made that intent clear. FMV and USP are intimately related concepts, given full meaning only by their relationship to one another. The Antidumping Act revolves around the difference between the two. *See* 19 C.F.R. § 353.2(f)(1) (1993) (defining dumping margin with reference to USP and FMV). In slightly different forms, the USP provision, 19 U.S.C. § 1677a, and the FMV provision, 19 U.S.C. § 1677b, were passed together as part of the original Antidumping Act, 1921, ch. 14, 42 Stat. 11 (1921). From the Act's beginning, therefore, it is likely Congress has considered one only with reference to the other and has been well aware of any differences between them. That Congress included a deduction for transportation costs from USP but not from FMV leads us to conclude that Congress did not intend pre-sale home-market transportation costs to be deducted from FMV.

Ad Hoc Comm., No. 93–1239 at 7–8 (footnote omitted).

Torrington argues that the Federal Circuit's decision in *Ad Hoc Comm.* "held that the Department of Commerce lacks authority under the circumstance-of-sale provision (19 U.S.C. § 1677b(a)(4)) to adjust foreign market value for pre-sale inland freight expense." *Torrington's Motion* at 1–2. Therefore, Torrington argues that this Court's decision affirming the ITA's grant of an adjustment to FMV for pre-sale inland freight was in error and this Court should modify its decision on this issue and remand this case back to the ITA ordering the ITA to recalculate all antidumping duty margins without allowing a deduction for pre-sale inland freight in the calculation of FMV. *Id.* at 2.

Defendant opposes Torrington's motion. Specifically, defendant argues that the Federal Circuit's decision in *Ad Hoc Comm.* only applies to adjustments to FMV for pre-sale inland freight in situations where FMV has been calculated based upon purchase price.[1] Defendant points out that the Federal Circuit explicitly limited its decision on this issue to the calculation of FMV based upon purchase price and not when exporter's

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[1] Purchase price and exporter's sales price ("ESP") are the two types of United States price. USP, purchase price and ESP are defined at 19 U.S.C. § 1677a (1988):

> **(a) United States price**
>
> [T]he term "United States price" means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate.
>
> **(b) Purchase price**
>
> "[P]urchase price" means the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States.
>
> **(c) Exporter's sales price**
>
> "[E]xporter's sales price" means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter * * *.

The purchase price is normally used as USP where the transaction prior to importation is between unrelated parties, or at arm's length. The exporter's sales price will be used as the USP when the U.S. importer and the foreign seller are "related parties." *See* 19 U.S.C. § 1677(13) (1988). The exporter's sales price will be the price at which the merchandise is first sold to an unrelated purchaser in the United States. 19 U.S.C. § 1677a(c).

sales price ("ESP") is used to calculate FMV. *Defendant's Opposition to Plaintiff's Motion to Modify Judgment and Issue a Second Remand Order ("Defendant's Opposition")* at 2.

Defendant and defendant-intervenors SKF USA Inc. and SKF Industrie, S.p.A. ("SKF") also argue that the Federal Circuit's decision on this issue was based on the ITA's stated rationale for its decision, *i.e.*, the ITA's inherent authority to fill gaps in the statutory framework to achieve the purposes of the statute, and not on the circumstance of sale provision found at 19 U.S.C. § 1677b(a)(4)(B) (1988). *Defendant's Opposition* at 2; *Defendant-Intervenor's Response to Plaintiff's Motion to Modify Judgment and Issue a Second Remand Order ("SKF's Response")* at 2–3.

Defendant and SKF point out that Torrington challenged only the ITA's treatment of FAG Cuscinetti SpA's ("FAG") pre-sale inland freight expenses. Therefore, defendant and SKF argue that Torrington cannot now request this Court to order the recalculation of all the other parties dumping margins. *Defendant's Opposition* at 2; *SKF's Response* at 2.

Finally, defendant argues that the ITA has not had an opportunity to consider its position on this issue in light of the Federal Circuit's decision in *Ad Hoc Comm.* Defendant requests this Court to remand this issue to the ITA so it can "consider the appellate decision and its impact upon this case and whether other alternatives exist for treatment of pre-sale inland freight expenses." *Defendant's Opposition* at 2.

This Court finds that Torrington's characterization of the Federal Circuit's decision in *Ad Hoc Comm.* is incorrect on certain points. First, the *Ad Hoc Comm.* court specifically noted that it was not ruling on whether the ITA has authority to adjust FMV for pre-sale inland freight pursuant to the circumstance of sale provision at 19 U.S.C. § 1677b(a)(4)(B). *Ad Hoc Comm.*, No. 93–1239 at 5 n.8. Second, the *Ad Hoc Comm.* court limited its decision to the calculation of FMV in purchase price situations only. *Id.* at 5. Therefore, this Court finds that there is no basis for remanding this case to the ITA in regard to situations where FMV was calculated based upon ESP.

It is a cardinal rule of administrative law that an agency should be allowed to decide an issue for itself before a court addresses that issue. *McKart v. United States*, 395 U.S. 185, 194 (1969). This Court agrees with the ITA that it should be given the opportunity to address this issue first in light of the Federal Circuit's decision in *Ad Hoc Comm.*

Therefore, this case is remanded to the ITA to allow the ITA to determine whether it has statutory authority to adjust FMV, calculated using purchase price, for only FAG's pre-sale inland freight in light of *Ad Hoc Comm.*, No. 93–1239.

2. *Remand Results:*

The ITA's Remand Results deserve to be quoted at length:

> [W]e have applied our current administrative practice to the U.S. discounts in question. Our current administrative practice is to,

> deduct [ ] all U.S. discounts, rebates, or price adjustments if actual amounts were reported on a transaction-specific basis. If these expenses were not reported on a transaction-specific basis, we used BIA for the adjustment and treated the adjustment as a direct deduction from USP.

Final Results of Antidumping Duty Administrative Reviews and Revocation in Part of an Antidumping Duty Order: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France et al., 58 Fed. Reg. 39,729, 39,759 (1993). The U.S. discounts in question were not reported on a transaction-specific basis, and, as such, the Department had to determine a BIA methodology for the discounts, and to treat this adjustment as a direct expense. The Department has determined that BIA is the highest discount rate reported for any U.S. sale, this rate to be applied to all U.S. sales for which a discount was granted.

The Court decision also includes a final order ordering the Department to apply Italy's value added tax ("VAT") rate to the United States price calculated at the same point in the stream of commerce as that at which Italy's VAT is applied for home market sales, and to add the resulting amount to USP. In order to determine the actual BIA amounts for the U.S. discounts, the Department must know what the VAT adjustments will be. However, the order concerning VAT is not yet conclusive, *i.e.*, it is still appealable, and therefore the Department will determine the actual BIA amounts for the U.S. discounts when a conclusive determination on the VAT adjustment has been made. *See, Timken Co. v. United States*, 893 F.2d 337 (Fed. Cir. 1990). In *Timken*, the Court of Appeals for the Federal Circuit (CAFC) distinguished between a "final decision," *i.e.*, a decision which can be appealed, and a "conclusive decision," *i.e.*, a decision which can no longer be appealed. The Department is not required to implement a final decision until it becomes conclusive. Thus, the Department's action here is in accordance with the CAFC's ruling in *Timken*.

Remand Results at 2–3.

This Court does not agree with the ITA's interpretation of *Timken*. The Federal Circuit's decision in *Timken* dealt solely with the issue of when the ITA is required to publish a notice in the Federal Register of an adverse court decision pursuant to 19 U.S.C. § 1516a(e) (1988). The court found that the ITA is required to publish notice even if the decision may be, or is, appealed to the Federal Circuit. The Federal Circuit found that an appealable decision of this court "is not the *final* court decision *in the action*. In this context, the word 'final' is used as it is used in 28 U.S.C. § 2645(c), i.e., to mean 'conclusive.'" *Timken*, 893 F.2d at 339 (emphasis in original).

While the Federal Circuit found that the ITA was not required to order liquidation pursuant to 19 U.S.C. § 1516a(e) when a decision of the Court of International Trade is not "conclusive," the ITA is nevertheless required to publish notice of the adverse decision and suspend liquidation of the subject merchandise until there is a "conclusive" court decision which will govern liquidation. *Timken*, 893 F.2d at 339–42.

In this case, this Court entered partial final judgment on the VAT issue *ordering* the ITA to treat VATs in a certain way. This partial final judgment is not "conclusive" within the meaning of *Timken*. However, that fact does not justify the ITA's refusal to implement this Court's order. Recalculation of the VAT in this case will not in any way change the position of the parties and has no effect on any appeal of the partial final judgment to the Federal Circuit.

This Court finds that this situation is more analogous to whether the ITA is required to publish notice of an adverse court decision rather than if the ITA is to liquidate entries in accordance with a decision that is not "conclusive." The Court has merely ordered the ITA to recalculate dumping margins using a new VAT methodology. This Court has not ordered the ITA to publish those new margins or order liquidations at the new margin rate.

At the time the ITA was required to file its Remand Results in this case no party had appealed the VAT issue to the Federal Circuit.[2] Indeed, it is clear from the Remand Results that the ITA itself is not appealing this Court's order. This Court finds that the ITA had no grounds for not implementing this Court's partial final judgment ordering the ITA to "apply Italy's VAT rate to USP calculated at the same point in the stream of commerce as where Italy's VAT is applied for home market sales and add the resulting amount to USP." *Torrington*, 17 CIT at ____, Slip Op. 93–234 at 14.

As to the treatment upon remand of U.S. discounts, the ITA seems to acquiesce in the Court's remand instructions but has not performed the required calculations due to its views on implementing the new VAT methodology. *Remand Results* at 2. Since this Court finds that the ITA is required to implement the new VAT methodology, ITA shall proceed with the calculation of U.S. discounts.

CONCLUSION

Therefore, this Court remands this case to the ITA. The ITA is ordered to implement its new VAT methodology, to recalculate the VAT in this case pursuant to the partial final judgment on this issue previously entered in this case, and to use the newly calculated VAT to determine BIA for U.S. discounts. In addition, the ITA will determine whether it has statutory authority to adjust FMV, calculated using purchase price, for only FAG's pre-sale inland freight in light of *Ad Hoc Comm.*, No. 93–1239. Remand results are to be filed with this Court within sixty (60) days. Comments or responses by the parties are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

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[2]SKF filed notice of appeal of this Court's partial final judgment on the VAT issue. Notice of Appeal, Court No. 91–08–00568 (Feb. 8, 1994).

(Slip Op. 94–38)

TORRINGTON CO., PLAINTIFF, AND FEDERAL-MOGUL CORP., PLAINTIFF-INTERVENOR *v.* UNITED STATES, DEFENDANT, AND SKF USA INC., SKF GMBH, GMN GEORG MULLER NURNBERG AG, NTN BEARING CORP. OF AMERICA, NTN KUGELLAGERFABRIK (DEUTSCHLAND) GMBH, CATERPILLAR INC., FAG KUGELFISCHER GEORG SCHAEFER KGAA, INA WALZLAGER SCHAEFFLER KG, INA BEARING CO., INC., MESSERSCHMITT-BOELKOW-BLOHM, GMBH, AND MBB HELICOPTER CORP., DEFENDANT-INTERVENORS

Court No. 91–08–00567

Plaintiff moves pursuant to Rules 1 and 7 of the Rules of this Court for modification of this Court's decision in *Torrington Co. v. United States*, 17 CIT ____, 832 F. Supp. 379 (1993), asking this Court to remand this case to the Department of Commerce, International Trade Administration ("ITA"), to recalculate all antidumping duty margins without allowing a deduction for pre-sale inland freight in the calculation of foreign market value ("FMV") pursuant to the United States Court of Appeals for the Federal Circuit's decision in *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States*, No. 93–1239 (Fed. Cir. Jan. 5, 1994).

Held: This case is remanded to the ITA to allow the ITA to determine whether it has statutory authority to adjust FMV, calculated using purchase price, for pre-sale inland freight in light of *Ad Hoc Comm.*, No. 93–1239.

[Plaintiff's motion granted in part; case remanded.]

(Dated March 4, 1994)

Stewart and Stewart (Eugene L. Stewart, Terence P. Stewart, James R. Cannon, Jr., Wesley K. Caine, Myron A. Brilliant, Geert De Prest, Margaret E.O. Edozien, Robert A. Weaver, David Scott Nance and *Amy S. Dwyer)* for plaintiff The Torrington Company.

Frederick L. Ikenson, P.C. (Frederick L. Ikenson, J. Eric Nissley and *Joseph A. Perna, V)* for plaintiff-intervenor Federal-Mogul Corporation.

Frank W. Hunger, Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Velta A. Melnbrencis* and *Jane E. Meehan);* of counsel: *John D. McInerney,* Acting Deputy Chief Counsel for Import Administration, *Dean A. Pinkert, Stephen J. Claeys, Douglas S. Cohen* and *Thomas H. Fine,* Attorney-Advisors, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, for defendant.

Howrey & Simon (Herbert C. Shelley, Scott A. Scheele, Alice A. Kipel, Juliana M. Cofrancesco and *Thomas Trendl)* for defendant-intervenors SKF USA Inc. and SKF GmbH.

Grunfeld, Desiderio, Lebowitz & Silverman (Bruce M. Mitchell and *Philip S. Gallas)* for defendant-intervenor GMN Georg Muller Nurnberg AG.

Barnes, Richardson & Colburn (Robert E. Burke, Donald J. Unger, Kazumune V. Kano and *Diane A. MacDonald)* for defendant-intervenors NTN Bearing Corporation of America and NTN Kugellagerfabrik (Deutschland) GmbH.

Powell, Goldstein, Frazer & Murphy (Richard M. Belanger and *Neil R. Ellis)* for defendant-intervenor Caterpillar Inc.

Grunfeld, Desiderio, Lebowitz & Silverman (Max F. Schutzman, David L. Simon, Andrew B. Schroth and *Matthew L. Pascocello)* for defendant-intervenor FAG Kugelfischer Georg Schafer KGaA.

Arent Fox Kintner Plotkin & Kahn (Stephen L. Gibson and *Eleanor Pelta)* for defendant-intervenors INA Walzlager Schaeffler KG and INA Bearing Company, Inc.

Rogers & Wells (William Silverman and *Ryan Trainer)* for defendant-intervenor Messerschmitt-Boelkow-Blohm, GmbH and MBB Helicopter Corporation.

OPINION

TSOUCALAS, *Judge:* Plaintiff, The Torrington Company ("Torrington"), moves pursuant to Rules 1 and 7 of the Rules of this Court for modification of this Court's decision in *Torrington Co. v. United States,* 17 CIT ____, 832 F. Supp. 379 (1993). Torrington asks this Court to remand this case to the Department of Commerce, International Trade Administration ("ITA"), to recalculate all antidumping duty margins without allowing a deduction for pre-sale inland freight in the calculation of foreign market value ("FMV") pursuant to the United States Court of Appeals for the Federal Circuit's ("Federal Circuit") decision in *Ad Hoc Comm. of AZ-NM-TX-FL Producers of Gray Portland Cement v. United States,* No. 93–1239 (Fed. Cir. Jan. 5, 1994). *Motion of The Torrington Company to Modify Judgment and Issue a Second Remand Order ("Torrington's Motion").*

BACKGROUND

In *Torrington,* 17 CIT at ____, 832 F. Supp. at 387, this Court stated that:

> The reasoning of this Court in upholding the ITA's treatment of pre-sale inventory carrying costs in this case is equally applicable to the ITA's treatment of pre-sale movement expenses. The ITA's decision to compare U.S. price to home market price at a contemporaneous point in the chain of commerce is reasonable. *Torrington Co.,* 17 CIT at ____, 818 F. Supp. at 1576. In this case, the ITA has chosen an ex-factory price as the contemporaneous point in the chain of commerce. In order to make this comparison certain expenses need to be removed from both U.S. and home market prices. This Court finds nothing unreasonable in the ITA's removal of pre-sale movement expenses from both U.S. and home market prices as measured from the same point in the chain of commerce, in this case ex-factory. *Torrington Co.,* 17 CIT at ____, 818 F. Supp. at 1576; *Ad Hoc Comm.,* 16 CIT at ____, 787 F. Supp. at 211–13. This method of treating pre-sale home market movement expenses has also been specifically upheld by this court in a well reasoned opinion in *Nihon Cement Co. v. United States,* 17 CIT ____, ____, Slip Op. 93–80 at 30–34, 1993 WL 185208 (May 25, 1993).
>
> Therefore, this Court affirms the ITA's deduction of SKF's pre-sale movement expenses from FMV.

DISCUSSION

The Federal Circuit in *Ad Hoc Comm.* stated:

> In the circumstances of this case, we believe that had Congress intended to deduct home-market transportation costs from FMV, it would have made that intent clear. FMV and USP [United States price] are intimately related concepts, given full meaning only by their relationship to one another. The Antidumping Act revolves around the difference between the two. *See* 19 C.F.R. § 353.2(f)(1) (1993) (defining dumping margin with reference to USP and FMV). In slightly different forms, the USP provision, 19 U.S.C. § 1677a,

> and the FMV provision, 19 U.S.C. § 1677b, were passed together as part of the original Antidumping Act, 1921, ch. 14, 42 Stat. 11 (1921). From the Act's beginning, therefore, it is likely Congress has considered one only with reference to the other and has been well aware of any differences between them. That Congress included a deduction for transportation costs from USP but not from FMV leads us to conclude that Congress did not intend pre-sale home-market transportation costs to be deducted from FMV.

Ad Hoc Comm., No. 93–1239 at 7–8 (footnote omitted).

Torrington argues that the Federal Circuit's decision in *Ad Hoc Comm.* "held that the Department of Commerce lacks authority under the circumstance-of-sale provision (19 U.S.C. § 1677b(a)(4)) to adjust foreign market value for pre-sale inland freight expense." *Torrington's Motion* at 1–2. Therefore, Torrington argues that this Court's decision affirming the ITA's grant of an adjustment to FMV for pre-sale inland freight was in error and this Court should modify its decision on this issue and remand this case back to the ITA ordering the ITA to recalculate all antidumping duty margins without allowing a deduction for pre-sale inland freight in the calculation of FMV. *Id.* at 2.

Defendant and defendant-intervenors SKF USA Inc. and SKF GmbH ("SKF") oppose Torrington's motion. Specifically, defendant and SKF argue that the Federal Circuit's decision in *Ad Hoc Comm.* only applies to adjustments to FMV for pre-sale inland freight in situations where FMV has been calculated based upon purchase price.[1] Defendant and SKF point out that the Federal Circuit explicitly limited its decision on this issue to the calculation of FMV based upon purchase price and not when exporter's sales price ("ESP") is used to calculate FMV. *Defendant's Opposition to Plaintiff's Motion to Modify Judgment and Issue a Second Remand Order ("Defendant's Opposition")* at 2; *Defendant-Intervenors' Opposition to Plaintiff's Motion to Modify Judgment and Issue a Second Remand Order ("SKF's Opposition")* at 2–4.

SKF points out that the adjustment of FMV for pre-sale inland freight in ESP situations has been specifically upheld by the Federal Circuit in *Smith-Corona Group v. United States*, 713 F.2d 1568 (Fed. Cir. 1983), *cert. denied*, 465 U.S. 1022 (1984). *SKF's Opposition* at 2.

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[1] Purchase price and exporter's sales price ("ESP") are the two types of United States price. USP, purchase price and ESP are defined at 19 U.S.C. § 1677a (1988):

> **(a) United States price**
>
> [T]he term "United States price" means the purchase price, or the exporter's sales price, of the merchandise, whichever is appropriate.
>
> **(b) Purchase price**
>
> "[P]urchase price" means the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from a reseller or the manufacturer or producer of the merchandise for exportation to the United States.
>
> **(c) Exporter's sales price**
>
> "[E]xporter's sales price" means the price at which merchandise is sold or agreed to be sold in the United States, before or after the time of importation, by or for the account of the exporter * * *.

The purchase price is normally used as USP where the transaction prior to importation is between unrelated parties, or at arm's length. The exporter's sales price will be used as the USP when the U.S. importer and the foreign seller are "related parties." *See* 19 U.S.C. § 1677(13) (1988). The exporter's sales price will be the price at which the merchandise is first sold to an unrelated purchaser in the United States. 19 U.S.C. § 1677a(c).

Defendant and SKF also argue that the Federal Circuit's decision on this issue was based on the ITA's stated rationale for its decision, *i.e.*, the ITA's inherent authority to fill gaps in the statutory framework to achieve the purposes of the statute, and not on the circumstance of sale provision found at 19 U.S.C. § 1677b(a)(4)(B) (1988). *Defendant's Opposition* at 2; *SKF's Opposition* at 4–7.

SKF argues that 19 U.S.C. § 1677b(a)(1) (1988) and 19 U.S.C. § 1677a (d)(1)(A) (1988) provide statutory authority for the ITA to adjust FMV for pre-sale inland freight. *SKF's Opposition* at 4–5.

SKF also argues that the circumstance of sale provision at 19 U.S.C. § 1677b(a)(4)(B) also provides authority for an adjustment in this case as SKF alleges that the record shows that SKF's presale inland freight expenses were directly related to sales. *Id.* at 6–7.

Defendant points out that Torrington challenged only the ITA's treatment of SKF's pre-sale inland freight expenses. Therefore, defendant argues that Torrington cannot now request this Court to order the recalculation of all the other parties dumping margins. *Defendant's Opposition* at 2.

Finally, defendant argues that the ITA has not had an opportunity to consider its position on this issue in light of the Federal Circuit's decision in *Ad Hoc Comm.* Defendant requests this Court to remand this issue to the ITA so it can "consider the appellate decision and its impact upon this case and whether other alternatives exist for treatment of presale inland freight expenses." *Id.* at 2.

This Court finds that Torrington's characterization of the Federal Circuit's decision in *Ad Hoc Comm.* is incorrect on certain points. First, the *Ad Hoc Comm.* court specifically noted that it was not ruling on whether the ITA has authority to adjust FMV for pre-sale inland freight pursuant to the circumstance of sale provision at 19 U.S.C. § 1677b (a)(4)(B). *Ad Hoc Comm.*, No. n.8. Second, the *Ad Hoc Comm.* court limited its decision to the calculation of FMV in purchase price situations only. *Id.* at 5. Therefore, this Court finds that there is no basis for remanding this case to the ITA in regard to situations where FMV was calculated based upon ESP.

It is a cardinal rule of administrative law that an agency should be allowed to decide an issue for itself before a court addresses that issue. *McKart v. United States,* 395 U.S. 185, 194 (1968). This Court agrees with the ITA that it should be given the opportunity to address this issue first in light of the Federal Circuit's decision in *Ad Hoc Comm.*

NTN alleges in its Comments on the ITA's Redetermination on Remand that the ITA used the sample factor on NTN's total sales, creating a huge Potential Uncollected Dumping Duties number. NTN also asks this Court to remand this matter so that this simple clerical error may be corrected. The ITA, on this remand, is also to correct this error if, in fact, it finds that it made this clerical error.

CONCLUSION

Therefore, this case is remanded to the ITA to allow the ITA to determine whether it has statutory authority to adjust FMV, calculated using purchase price, for pre-sale inland freight in light of *Ad Hoc Comm.*, No. 93–1239. It is also remanded to the ITA to correct any clerical errors that may have been made as far as NTN is concerned. Remand results are to be filed with this Court within sixty (60) days after the date of entry of this Court's decision regarding the ITA's remand results on the value added tax issue which is currently pending before this Court. Comments or responses by the parties are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days of the date responses or comments are due.

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
C94/16 3/1/94 DiCarlo, J.	A.T. Clayton & Co., Inc.	91–09–00679	254.56	254.80 Duty free	Agreed statement of facts	Houston "GIROFORM CF or GIROFORM CFB"
C94/17 3/1/94 Tsoucalas, J.	Flexion, Inc.	93–02–00116	Not stated	3921.90.4050 4.2%	Agreed statement of facts	Alexandria Bay, NY Flexible polyvinyl chloride ("PVC") sheets reinforced with fiberglass invoiced as "Blackflex" and "Ivoryflex"
C94/18 3/1/94 DiCarlo, J.	W.R. Rilbin & Company Inc.	91–07–00478	653.39	766.25 Duty free	Agreed statement of facts	Detroit Antique chandeliers

ABSTRACTED VALUATION DECISIONS

DECISION NO. DATE JUDGE	PLAINTIFF	COURT NO.	VALUATION	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
V94/6 3/3/94 Carman, J.	Junior Apparel Centers, Inc.	93–04–00212	Transaction Value	1.20	Agreed statement of facts	San Juan Wearing apparel

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